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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF ADMIRALTY;

COMMENCING WITH THE
JUDGMENTS
OF
THE RIGHT HON. SIR WILLIAM SCOTT,
Michaelmas Term 1798.

By CHR. ROBINSON, LL.D. ADVOCATE.

VOLUME THE SIXTH.

L O N D O N:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR J. BUTTERWORTH, AND FOR J. WHITE, FLEET-STREET.

1808.

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OF

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Anna Catharina, Wupper, 16th Nov. 1805	Affirmed.
Argo, Smith, 6th May 1802 - -	Affirmed.
Betsey, Murphy, 22d June 1799 - -	Affirmed.
Cape of Good Hope, 24th May 1802 -	Affirmed.
Columbia, Weeks, 12th August 1801 -	Affirmed.
Conqueror, Tate, 29th March 1803 -	Affirmed.
Edward, Bartlet, 24th November 1804 -	Affirmed.
Eenrom, Frontier, 27th March 1802 -	Affirmed.
Embden, Meyer, 10th February 1800 -	Affirmed.
Graaf Bernstorff, Belmer, 23d April 1803	Affirmed.
Haabet, Vette, 16th August 1803 -	Affirmed.
Harmony, Bool, 11th July 1803 -	Affirmed.
Henric and Maria, Baar, 7th Aug. 1807.	Affirmed.
Josephine, Fish, 9th July 1803 -	Affirmed.
Maria, Paulsen, 2d July 1802 -	Affirmed.
Nancy, Joy, 17th December 1802 -	Affirmed.
Nancy, Knudson, as } to the Cargo, } 5th April 1803 -	Affirmed.
—, as to the restitu- } tion of the Ship } - -	Reversed.
Orion, Cushing, 29th March 1804 -	Affirmed.
Perseverance, Sneydan, 10th Aug. 1803	Affirmed.
Rendsberg, Nyberg, 11th Aug. 1803 -	Affirmed.
—, —, 7th Feb. 1808 -	Affirmed.
	Rosalia,

(x)

Rofalia and Betty (a), 6th May, 1802 - Affirmed.
Sufa, Haffey, 19th March 1803 - Affirmed.
Vrow Anna Catharina, Mahts, 15 Dec. 1805 Affirmed.

BEFORE THE JUDGES' DELEGATE,

IN CAUSES CIVIL AND MARITIME.

Betty Cathcart, Gillespie, 1st July 1800 - Affirmed.
La Dame Cecile, Barret, 21st July 1808 - Affirmed.
William, Beckford, 24th Nov. 1801 - Affirmed.

(a) Affirmed in principle by the *Rofalia and Betty, Roper*, 6th May, 1802, in which the Lords of Appeal held, that the carrying outwards with false Papers, would affect the *returned* Cargo, with Condemnation.

**A LIST of Cafes of Blockade, heard on Appeal from the
High Court of Admiralty.**

Names of Cafes.	Cafes reported.	Blockade.	Affirmed.
Adonis, Gottschalk - -	Vol. V. pag. 256.	Havre -	21 July 1807.
Æolus, Zubecke - -	- - -	- - -	19 June 1807.
America, Burger - -	- - -	Texel -	8 June 1807.
Frederick, Grubans - -	- - -	Havre -	11 July 1807.
Genet, Barrett - -	- - -	Texel -	24 June 1807.
Gute Erwartung, Gay - -	Vol. VI. pag.	Havre -	7 August 1807.
Henrich & Maria, Gausfel - -	- - -	Havre -	11 July 1807.
Jacob Zacharias, } & Tre Soffre, }	- - -	Texel -	15 June 1807.
Jonge Neletta - -	- - -	- - -	Abandoned.
Irene, Lubben - -	Vol. VI. pag. 76.	Elbe -	21 July & 4th August 1807.
Maria Margaretha, Hagguiß - -	- - -	Havre -	21 July 1807.
Neptunus, Ewaß - -	- - -	Do. -	Do. Do.
Neptunus, Hanfes - -	- - -	Texel -	24 June 1807.
Nra Sra Del Buen Viage - -	- - -	Dieppe -	Agreed.
Ocean, Parker - -	Vol. III. pag. 297.	Texel -	24 June 1807.
Patrioten, Wolff - -	- - -	Do. -	2 June 1807.
Pöken Myll - -	- - -	Do. -	19 June 1807.
Spee, Cornelis - -	Vol. V. pag. 76.	Elbe -	21 July & 4th August 1807.
Stadt Copenhagen, Freekes - -	- - -	Texel -	24 July 1807.
Vigilantie, Haryers - -	- - -	Wefer -	4 August 1807.
Unverhoft, Cornelis - -	- - -	Do. -	24 June 1807.

The following Cafes were appealed on Questions of Blockade, but were condemned on the 17th July 1806, as Enemies Property, on the breaking out of Prussian Hostilities.

July 17th, 1806.

Æolus, Schmidt	Oadeße Wilhelm, Runbut
Æolus, Zubecke	Triton, Beehm
(s) 2 Adm. Calypso (s) Schultz	Twec Gebroeders, Alberts
Rep. p. 298, Harmina, Muir	Twec Gebroeders, Gerdes
Huifmans, Welvaett	Twec Gebroeders, Wybree
Neptunus, Veen	Vryden, Ordt

✪ The Tables of Dates of Hostilities, Blockades, &c. inserted in the former Volumes of these Reports, have not been retained in this Volume, as the several Notifications of that kind, which have issued from the commencement of the war in 1803 have been collected, and published separately.

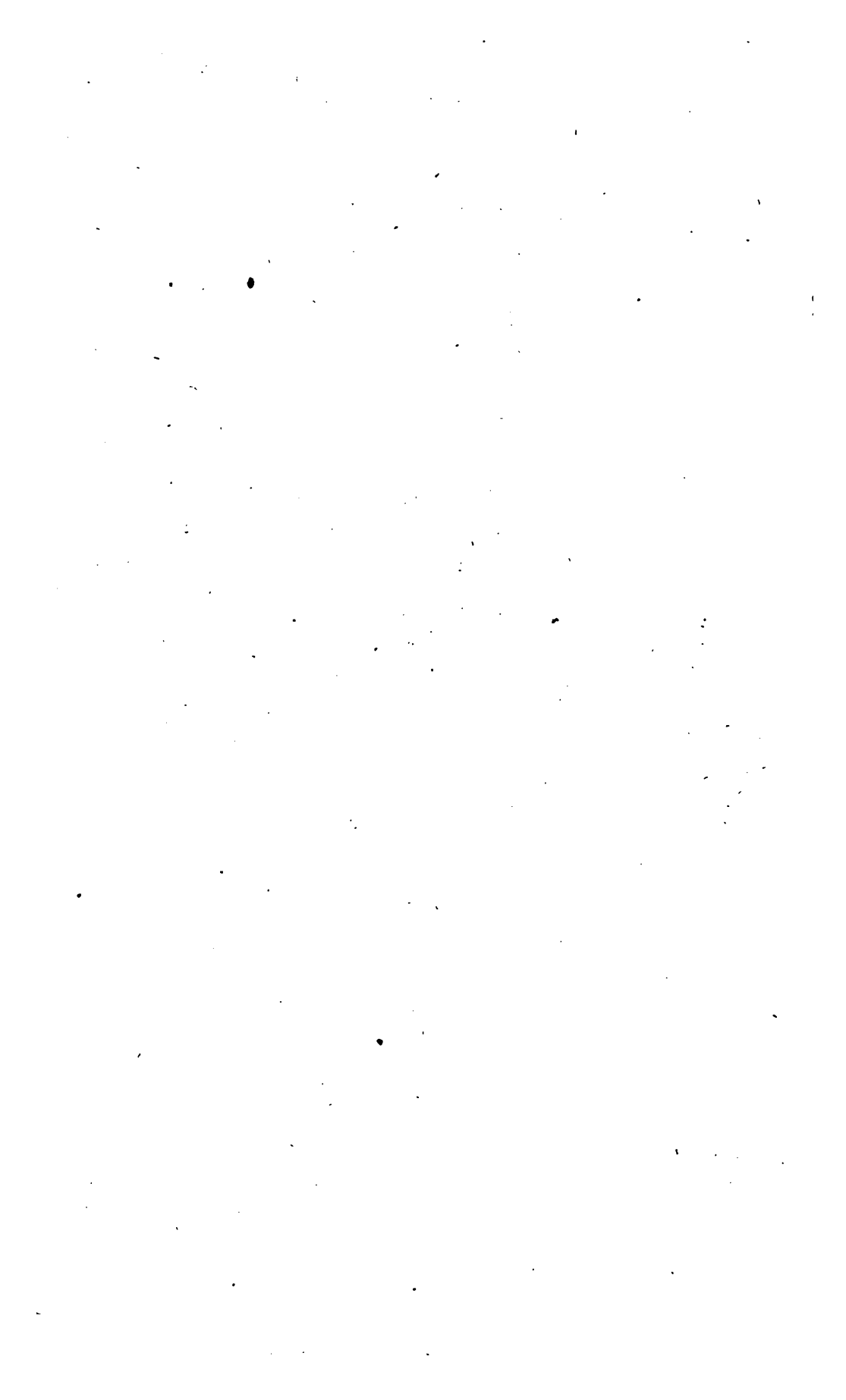
For the same Reason the Orders of Council, referred to in this Volume, have not been printed entire; as they also may be found in that Collection.

ERRATA, Part I. Vol. 6.

Page	26,	line	14,	read 'proprietary'
—	49	—	23,	transpose, 'to that effect,' to line 24 'after nothing'
—	83	—	19,	for 'concerned' read 'concerted'
—	87	—	6,	from bottom, for 'penalty' read 'penally'
—	—	—	3,	from bottom, insert 'other before way'
—	93	—	2,	for 'a certain' read 'the'
—	99	—	18,	for 'distinction' read 'distribution'
—	144	—	5,	from bottom, 'for each party' read 'both parties'

ERRATA, Part II. Vol. 6.

Page	226,	line	penult,	insert 'not under' before 'any'
—	228	—	19,	for 'there' read 'their'
—	287	—	4,	from bottom, dele (a)—and in the margin for '(a)' insert '(b)' Scobel ut infra
—	325	—	11,	(note) dele 'only'
—	343	—	8,	from bottom, for '39th' read '37th'
—	387	—	11,	insert 'of' before 'which,' and after 'not' insert 'take'



R E P O R T S
OF
C A S E S
DETERMINED IN THE
HIGH COURT OF ADMIRALTY,
C. C. C.

LA FLORA, KLEIN.

March 14th,
1805.

THIS was a case arising on a claim for a cargo of *Spanish wool* given by Mr. Lewis, of London, under the instructions 4th of September, 1803 (a).

Instructions as to the restitution of Spanish wool, Sept. 1803; on claim of consignee—Fact of consignment, *disputed*—Not proved—*Ultior* consignment not sufficient.

The

(a) Whereas we have thought it expedient to protect from capture and condemnation, wool, the growth and production of *Spain*, laden on board ships belonging to any State in amity with us, and tonnage consigned to any merchant of our united kingdom: The commanders of our ships of war and privateers are hereby required and enjoined not to detain or molest any vessels belonging to any State in amity with us, on account of their having on board any wool, the growth and production of *Spain*, and coming consigned to any merchant of our united kingdom: And in case any such

La
FLORA.

March 14th,
1805.

The ship's papers expressed a destination to *Embden*; and the master and other witnesses examined in preparatory, described the voyage to have been to *Embden*.

On the part of the Captor, The King's Advocate and Robinson argued—That the instructions under which the claim was given, required an actual destination to this kingdom; that the only destination which was to be collected from the original evidence was to *Embden*, and if any other was *now averred*, it was contradicted by the papers and the depositions, and that it could not be set up in opposition to all the preparatory evidence.

In support of the claim, Laurence argued—That it was not necessary to give any description of goods claimed under these instructions; that it was sufficient, if they were consigned to a *British* merchant; that the goods were actually consigned to this country, though the clearance was made out for *Embden*, and the neutral master seems to have thought himself bound to support the representation given in his papers. It was prayed that the Court would not hold this claim concluded by the ostensible description in the original evidence, but that it would permit other proof of the actual consignment to be supplied from the correspondence of the shippers.

wool so laden and consigned, shall be brought for adjudication before any of our Courts of Admiralty, we hereby direct that the same shall be forthwith liberated, upon a claim being given for it, by or on behalf of the merchant to whom it is consigned; notwithstanding the existing hostilities, or any other hostilities which may take place.

JUDGMENT.

HIGH COURT OF ADMIRALTY.

3

JUDGMENT.

Sir W. Scott.—The Crown, looking to the necessities of *British* commerce, has issued instructions, that wool coming from *Spain*, and consigned to merchants of this country, should be restored on the claim of the consignee, and not only restored, but forthwith restored, intimating by that term a desire that as little interruption as possible should be given to the importation of articles of this kind. It has been contended on the part of the captors to be an inflexible rule, that no claim shall be admitted in opposition to the depositions and the ship's papers. It is a general rule undoubtedly, but not without exception. In the *Curacoa* cases, the property was described to belong to merchants in *Holland*, by the deposition of the master, as well as in the ship's papers; yet on proof being made that the real interest belonged to persons in *Switzerland*, and that it was going under a general course of trade, for their actual account and risk, though documented in *Dutch* names, claims were admitted on behalf of the *Swiss* proprietors, and that property was finally restored. It is not, therefore, an inflexible rule as to property. Then how is it as to destination? It is admitted by the captors, that the papers must be simulated, since no clearance would be allowed to the ports of an enemy. The question would come to this, then, Whether the mere circumstance of a master adhering to his papers, under what may be considered as a kind of *ship-morality*, should exclude the claim of *British* merchants, who are in fact the consignees? I think that would be to attribute too much to his evidence. I shall permit this claim to be verified; and that as little time as possible may be lost, in similar cases, I shall direct that the

La
FLORA.

March, 14th, 1805.

La
FLORIDA.

March 14th,
1805.

bills of lading and the verification may in future be annexed, in the first instance, to claims given under these instructions. It may not be improper to observe, however, that merchants engaged in this trade, must take care to give their masters explicit instructions, as to the conduct which they ought to pursue on being brought in, that they should disclose the truth, without reserve or apprehension; because, although this case, arising at the very beginning of the war, may be entitled to some indulgence, it does not follow that the Court will think it equally proper to continue the same indulgence in all future cases.

On the 20th *March*, this case came on again upon proof of the actual consignment, to be extracted from the correspondence of the *Spanish* shippers (a).

On

(a) The following extracts will explain the embarrassment of the *Spanish* shippers, and the nature of the obscurity in which the transaction first presented itself:

18 Dec. 1804. "We have only time to confirm to you our last of the 13th instant, whereof a copy accompanies this, and to inform you, that in consequence of the declaration of war between the two powers, we shall be under the necessity of altering the destination of Captains *E. Haseman* and *Olfert Olferts Klein*, who will be documented as if they were bound to *Emden*, to the consignment and for account and risk of Mr. *Louis Sethe*, but their real destination will be to your place to your consignment, which you will communicate to the underwriters of our wools."

6 Jan. 1805. "The measures adopted by this government, in consequence of the declaration of war with your island, and the existing state of the commerce in this province, which has plunged the merchants into the greatest distress, prevent the transactions of business with that confidence which took place during other wars, and which, in the present case, deprive us of the means hitherto resorted to for the exportation of wools. The Government which has recently prohibited all direct and indirect commerce with your kingdom, and the vigilance of the Royal Judge

HIGH COURT OF ADMIRALTY.

On the part of the claimant, Laurence contended,—
That the expressions in these letters shewed in a very

[La
FLORA.

March 14th,
1805.

invested with the execution of such order, involves us in the greatest confusion as to the destination of Captain *Olfert Olferts Klein*, of the *Prussian* vessel *Flora*.

"We chartered this vessel under a colourable destination for *Emden*, but actually for *Southampton*, agreeable to the constant practice, the separate obligations which the captains were in the habit of contracting, constituting the security of real destination, but which it was not prudent to demand under the present rigorous circumstances, and which would inevitably expose us to danger.

"This extreme inconvenience has induced us to depart from the system adopted in other times, being obliged to leave to the courtesy and will of the captain the performance of the original simulated affreightment, or the performance of the one appearing by the ship's papers.

"Impressed with apprehension of such consequence, we told Captain Klein, we were unable to furnish him with any other instructions, in the consequence of existing circumstances, than those of proceeding to his actual destination of *Emden*, but that he knew his primitive obligation, and that in the event of his putting into any of the ports of your island, he should advise you. Our language on taking leave of Captain Klein, and he himself feeling the rigour with which he was treated, impressed upon the said captain the motives which compelled us to explain ourselves in that tone, without leaving him ignorant that our intentions were, that he should put in at one of your ports. We know not whether this captain will perform his engagement or not as a man of honour, although it is to be apprehended that he will proceed direct to *Emden*, seeing himself without any signed obligation to the contrary; and should the same happen, we have this day written to Mr. *Louis Sethe*, in order that he may immediately, on the receipt of the two hundred and thirty-six bags on board the vessel under the command of Captain Klein, forward them to you under his neutrality, availing himself of the first vessel he may wish to carry them."

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strong light the constraint under which the parties acted, that it was evidently the intention, and the original design of the voyage that the destination should be to this country ; but even if it could be supposed that the vessel would have gone, under any misapprehension of the master, to *Emden* in the first instance, the effect of the actual consignment to this country would not be defeated, since it was in evidence also that the shipper had given orders for the wool to be sent forward, on such a contingency, by an ulterior consignment to the persons claiming as *consignees* under the instructions ; that the effect of an ulterior consignment had been in many instances, especially in colonial cases, held to be the same, as an original consignment, and that the parties were entitled to the equity of the same construction in the present case.

On the part of the Captor, the King's Advocate, and Robinson.—The destination and consignment to which the instructions allude, must be a *precise* and actual consignment, and capable of being substantiated in proof. It is scarcely possible to suppose a case of this kind, that ought not to be supported in one of these modes, either by the ordinary formal evidence, or if that is prevented, by some proof of secret agreement between the shipper and the master, which would lay the master under an obligation to come to this country, in opposition to the ostensible destination expressed in his ship's papers. If such a contract had been shewn, although the master had departed from it, it might be sufficient to establish an actual consignment in law, which should not be defeated by any act of deviation on the part of the master.

master. But in this case, as it is now disclosed, the charter-party was made for a voyage to *Embden*: The intention of the *shipper* is left on that ground: The master was under no obligation to come to this country; and he has declared in his deposition, "that he had no such intention, but "that he was bound to *Embden*;" and such seems to have been the apprehension of the shipper himself. If the original destination cannot be supported in point of fact, as little can it be maintained in point of law, that a consignment to this country by *ulterior destination*, after the goods had been imported into *Embden*, would be protected under the terms of the instructions. As an order of council, relaxing for certain purposes the ordinary rule of law, it must be strictly taken, and with great simplicity, as to its obvious sense. When that is satisfied, it is not to be extended farther to comprehend cases that can only be brought within the terms by the help of remote inference, and a greater latitude of interpretation. It would be sufficient to refute this mode of construction, to suggest that the grant could not be carried into effect, without supposing a previous inquiry into the state of our Navigation Laws; since it is an obvious objection to *ulterior destination generally*, that by the very outline of our Navigation Laws, goods are in many instances *inadmissible* in that course when the *direct importation* would be allowed. It is now said that the prohibition as to this article, arising from the Navigation Act, was relaxed by a statute almost immediately *preceding* these instructions, (*Aug. 1803*); but the possibility of such an investigation being necessary to establish the legality of the *ulterior destination* in each particular case, affords a presumption, that it could not be the intention of the order to im-

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pose that difficulty on the Court, and to identify and confound things so different, as a direct and circuitous destination of *Spanish* wool from *Spain* to this country. The argument derived by analogy from colonial cases, will not support such a construction. In those cases the rule, as to ulterior destination, has been adopted only as a *check* upon schemes of fraudulent destination, that have been concealed under the pretence of an immediate destination to a neutral port. Even in those cases it has been varied and modified by slight circumstances, as by an actual intermixture with the commerce of the intervening port, even when the capture took place on the ulterior part of the voyage. This is a case only of a designed and *probable* ulterior destination at most. In such a case the rule, as *applied in the colonial cases*, would scarcely reach to identify such a purpose with the *actual destination*, without some evidence of fraud appearing in the former stages of the transaction. Would the effect be necessarily the same, so as to induce a belief that both modes of consignment must have been viewed in the same light? Evidently not. As long as the destination is required to be direct to this country, and is left to be substantiated by the evidence of the master, a guard is provided against abusing this relaxation, to supply the manufactures of *France* or *Holland*. The interest of the master as to his freight affords a controul over his conduct; but if the goods are to be allowed to go first to *Embsen*, such an ostensible purpose would afford them a passage to that port, without molestation, and they might then be sent on afterwards in perfect security for the supply of the manufactures of the enemy.

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Sir *William Scott*.—The intervention of hostilities has thrown upon the parties, and upon the Court which has to decide questions of this nature, considerable difficulties. It is impossible not to feel the importance of encouraging the importation of *Spanish* wool, for the supply of our manufactures. At the same time *That* encouragement cannot properly be given by erroneous judgments here; it must be derived from prospective regulations elsewhere, and from a higher authority. The order of council directs the restitution of *Spanish* wool, "*configned to this country.*" But the fact now turns out to be, that this cargo was consigned to *Embden*, not only ostensibly, but according to the private understanding of the shippers, who say, "that they had given instructions to persons there to receive the cargo, if it should actually arrive at *Embden*." The master also says absolutely "that he should have gone to *Embden*;" and unless I could hold to the extent contended in argument, that a circuitous ulterior destination to this country, either in the same ship, or in other ships, is to be considered in law as one identical consignment, I fear it is out of my power to bring the case within the provisions of the order of council. How far it may be proper to allow farther relaxation, or what considerations may interfere with such an extension of the indulgence, is a question of policy, which it may not be very easy to decide immediately, and which it would not become this Court to decide, or even entertain in the first instance. One consequence of such an extension may be easily foreseen, that if such a circuitous voyage was to be allowed, *Spanish* wools might with great security find their

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their way into *France* and *Holland*, for the supply of the manufactures of those countries I cannot but think; therefore, that Government would pause in sanctioning such an interpretation, till it had maturely weighed all the consequences that might be expected to result from it. It is my duty, however, to consider only, whether the words of the order can be supposed to embrace such a case; and my opinion is, that they cannot. There is, I think, some force in the argument which has been drawn from the ordinary bearing of the Navigation Laws. An act of relaxation has, I know, passed for the importation of certain articles of *Spanish* produce from other ports; but whether wool is so admitted, I cannot immediately take upon myself to determine. Looking to the whole circumstances of this case, I am induced to consider it as one, which has not yet met the attention of Government, and which does not come under the order of council. Under that view I feel myself bound to reject this claim.

[Specific claims were afterwards given for the principal part of this shipment for Mr. *Sethe* of *Embden*, and for *British* merchants, and those claims were restored.]

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THE ANNA CATHARINA, LAUREL.

Registrar's Report—Freight—Rate of Expences—Objections over-ruled.

THIS was a case on an objection to the report of the Registrar and merchants, with respect to the allowance of freight and expences decreed on a former day. The objection stated in the Act of Court was to the following effect: "That this ship was taken on the 7th *August* 1798, being part of the second *Swedish* convoy;

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convoy ; that divers farther proceedings were had, and on the 28th *July* 1800, the Judge pronounced freight, and expences to be due to the claimant to the time of the order for farther proof ; that on the 6th *December* 1803, the ship and cargo were condemned ; that the Registrar and Merchants have since made their report, and allowed the wages and maintenance of the master and crew only for 324 days, whereas, they ought to have *allowed* from the 7th *August* 1798, the time of capture, until the 8th *August* 1799, the time of the order for farther proof, being 366 days ; that only two shillings per day was allowed for the maintenance of the master and mate, and one shilling per day for the maintenance of each of the crew ; whereas the allowance to the master ought to have been three shillings and sixpence per day, to the mate two shillings per day, and to each mariner one shilling and three-pence per day, according to the rates which were adopted by His Majesty's Government, in the allowances made for the maintenance of the masters and crews of the *Swedish* ships detained under embargo in the year 1801. The Act of Court farther objected, that the allowance of ten guineas for the extra expences of the master was too little ; lastly, that the chain hire is allowed only for 324 days, instead of 366 days as afore-mentioned,

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On this statement, *Laurence and Swabey* contended to the effect of the plea, that the allowance ought to be increased.

The Registrar stated the grounds on which the report had been framed, viz. that the Registrar and Merchants, being apprized that the freight had already been paid by His Majesty's Government, had deducted

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deducted so much time from the period of detention, as it would have required to have delivered the cargo at *Lisbon*, the original port of destination.

Court.—I am of opinion that this deduction, as to the freight, is properly made; and that no reason is shewn to induce the Court to disturb that part of the report.—[As to the allowance to the master and the mate of two shillings per day, The Court asked whether that was not a rate of considerable standing? and intimated an opinion that three shillings per day might not, according to the present value of money, be too much.]

The Registrar said—That the allowance of two shillings was the ordinary rate between claimant and captor; that it had prevailed for a considerable time; that if it should appear to the Court not to be sufficient, it should be considered also, with reference to the usual rate of demurrage of ten shillings per ton per month, which in a late case (a) [*Louisa Albertina*,

(a) The objection to the report in that case stated, that it was the sum allowed thirty years ago, when provisions and wages were cheaper, and when transports were hired at seven or eight, and at most ten shillings per ton, whilst, in the last war, thirteen and fifteen shillings had been given, and in the present war, sixteen and eighteen shillings; that in some *American* cases, the Registrar and Merchants had allowed fifteen shillings.—Mr. *Winthrop*, one of the Merchants, observed, that this allowance to *American* ships had been made, in consideration that they usually paid higher wages, and employed more men than *Swedish* vessels; that the *Louisa* was a *Swedish* ship of 250 tons, with a crew of sixteen mariners, rather more than the proportion which *Swedish* ships usually

tina, 17 Dec. 1804.] was held to be sufficient; since, if the rate of subsistence was increased as a general rule, it would disturb the rate of demurrage.

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Court.—In the *Louisa*, it is true, I did not think proper to alter the rate of demurrage, under the circumstances of that case; but I certainly did not mean to express any opinion as to the propriety of adhering to that rate, as a general rule. It rather seemed to be a matter that might require farther consideration. What I shall do in the present instance, will be to allow the master something more for his extra expences, and confirm the report generally on the other points.—Three guineas ordered to be added to the allowance of extra expences.

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THIS was a question as to the interest of three parties, asserting themselves to be sole captors, as to sundry parcels of *French* property captured on a voyage from *Monte Video* to *Havre de Grace*.

Seizure, and agreement with the neutral master to bring in his vessel, if sufficient, &c.

It appeared in evidence that the ship, being an *American* vessel, had been stopped on the 28th of *September*, in latitude 31 N. longitude 32 W. from

usually carry; but even in that case, the rate appeared to the merchant, to be a sufficient allowance. The Registrar observed, that if an alteration of the general rule was deemed necessary, it would be desirable, that it might be still fixed at a general rate, on an average calculation. The Court confirmed that report, saying that it might be proper to give the general question farther consideration. The Registrar now said, that since the case of the *Louisa*, the merchants had tried the allowance of ten shillings per ton by several rules, and were still of opinion, that it was a sufficient allowance for *Swedish* ships, even in the present times.

London,

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London, by the (a) *Mary* privateer, and had been examined, and that two men were put on board for the purpose of conducting the vessel, according to the affidavit of the master of the *Mary*, into an *English* port. In the preparatory depositions it was stated, "that the master of the *Mary* only requested the *American* master to take on board those two men for the purpose of founding a claim to share in the capture, if the vessel should be captured by any other cruiser in a subsequent part of her voyage, and brought to adjudication. That the *American* master continued in possession of the papers, and in the navigation of the vessel during the whole voyage; that it was not his intention to go to an *English* port; and that he was actually steering for *Havre* at the time of his detention, 22d of *October*, by his Majesty's schooner the *Pickle*, in lat. 41 N. long. 17 W." It was admitted, on this part of the case, in the affidavit of the asserted prize-master of the *Mary*, that at the time when the *Pickle* came up, he was apprized of the intention of the *American* master to proceed by force to *Havre de Grace*, and that he begged protection and assistance from the *Pickle*, and obtained a supply of men, who finally brought the vessel into *Plymouth*. A second party, claiming to have made the original capture, was the *St. Andrew* privateer, of *Greenock*, who fell in with the vessel on the 6th of *October*, in lat. 39 deg. 55 m N. long. 28 deg. 25 m W. from *London*, examined her papers, heard the relation which was given on the part of the *Mary*, and put one man on board as prize-master, under an

(a) The *Mary* and the *St. Andrew* appeared to be merchant ships going to *America* and the *West Indies*, having letters of marque.

asserted promise from the *American* master "That he would go into *Falmouth*." The preparatory depositions described this man *to have been put on board as prize-master*; though as to the act of possession and management of the vessel, the evidence of the several parties was in direct contradiction. In the subsequent part of the voyage, this vessel was met, on the 22d of October, in latitude 41 N. 17 W. by the schooner *Pickle*, who put a sufficient number of men on board, and brought her into port.

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On the part of the Pickle, the King's Advocate and Robinson—From the situation in which the vessel was found, when the *Pickle* came up, having *French* property on board, and two parties of *Englishmen*, asserting different claims, and imploring assistance from an apprehension of a rescue, it became a necessary act of duty, on the part of the schooner, to take possession of the vessel, and send her in for adjudication. When the claims of the several parties were traced back, it appeared from the evidence of the master, that the first seizure of the *Mary* was only provisional, and *contingent*, for the purpose of founding a claim on any subsequent act of capture being made by other parties, to whom it might be less inconvenient to spare a sufficient force to complete an effectual seizure. If this capture was contingent only, the pretensions of the *St. Andrew* could not be of a higher nature, *since only one man* was put on board from that ship, and the first appearance given for her was only in the character of *joint-captor*. Supposing the possession taken prior to the seizure by the *Pickle*, to be of this *contingent* nature only, it was insufficient to found the interest of prize, as it was an act deficient in the intention, and *animus capiendi*. If it

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was to be contended, that the capture was absolute in virtue of the promise of the *American* master to submit, it is worthy of consideration how far a secret agreement of that kind, could be deemed a proper foundation for a right of prize. The right of prize is a compulsory right, to be distinctly exercised and effectually enforced. Many of the consequences resulting from it depend upon the precise character of the act itself. The legal responsibility for the capture was meant to attach on the *actual* possession. It is not to be left to this kind of compromise, which would have the effect of introducing a mixed state of things, in which the master, pleading to be exonerated from his original responsibility, by the restraint put upon his course, and the captor not being in actual possession, and claiming from that circumstance to be exonerated from the effect of any accident or mismanagement, there would be no party on whom the obligation and responsibility of the law would attach, in the manner in which the law supposes it to attach, as a consequence of full and complete possession. Captors have no power to exact such a promise from neutral vessels; and the effect of such promises would be injurious to the public interests of the country, by the insecurity in which the persons so put on board must necessarily be placed. This mode of capture seems therefore not to fulfil the intentions of the law, either with respect to the property detained, or the public POLICY of the country, under whose authority the right of seizure was exercised. The situation of the property, and of the several parties, will be to be considered as if no sufficient and complete act of capture had been made, prior to the seizure by the *Pickle*,
and

and the whole interest of prize will therefore vest in the *Pickle*, under that seizure.

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On the part of the first seizure, Arnold and Jenner contended—That the act done by the *Mary* was not fairly represented in the preparatory depositions. That it could not be supposed to be a mere *contingent purpose*, which, if the event of meeting with another *English* cruizer should fail, could only produce the effect of carrying the persons so put on board into a *French port*, and to a *French prison*. That the act of capture was absolute. That the force by which it was effected was immaterial. That the duties of a neutral master obliged him to submit to the consequences of lawful capture. That the Master in this instance did so submit in promise at least. That it was by no means incredible that he should enter into such an engagement, as it would be immaterial to him, whether he received his freight in a *British* or in a *French port*. That the prize-master of the *Mary* was not superseded, but continued in command of the vessel, and was proved to have been instrumental in hiring the pilot who brought the vessel into port.

On the part of the St. Andrew, Laurence contended—That there was no reason to discredit the account given in the preparatory examinations. That the first seizure was only contingent. That it might be a new question how far such a seizure could vest a joint interest in a subsequent capture by another cruizer; but that the seizure of the *St. Andrew* was not of that nature. It was a complete and absolute seizure, and was so described in the depositions of the master, who

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states, " that on the 4th of *October* she was detained by the *St. Andrew*, when a prize-master was put on board, with directions to carry her into *Falmouth*." And the prize-master of the *St. Andrew* was the person who actually directed the course of the vessel. This fact was more particularly proved by the act of his keeping a journal of her course, which was ready to be produced. The account given of a deviation from the intended course to *Falmouth* was *untrue*, and could not indeed admit of any proof, since the last seizure by the *Pickle* was made in latitude 41, at that period of the voyage when the actual course to the northward must have been nearly the same, whether the vessel was steered under an intention of going to an *English* port, or to *Havre de Grace*, the asserted port of original destination.

JUDGMENT.

Sir William Scott.—This was an *American* ship, with some *French* passengers and *French* property on board, seized on a voyage from *Montevideo* to *Havre de Grace*, and brought to *Plymouth* by the King's ship the *Pickle*. At the time of the seizure there were on board three persons, no part of the crew, but asserting themselves to be prize-masters, put on board by two privateers which had fallen in with this vessel in the earlier periods of her voyage. It appears that the Agent of the *Pickle* brought in the papers, and proceeded to take the preparatory examinations, before *Smith*, the prize-master of one of the privateers, was allowed to come on shore; and that *Smith* was afterwards impressed and taken out of the way. This representation is made on the affidavits to Mr. *Delacombe*, the Agent
of

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of the *Mary*, and is not contradicted. It is a fact, therefore, which I must take to be true, and one which tends to give no very favourable impression of the case, on the part of the *Pickle*. It was the evident duty of the persons proceeding to adjudication on behalf of the *Pickle*, to have taken care that no obstruction was thrown in the way of this person, to prevent him from coming forward to assert the interest of his ship. Instead of that, the prize-master is forcibly prevented from asserting his claim. This circumstance alone would deduct very materially from the effect of the examinations; and there are other circumstances which go farther, to deprive them of all credit. The account given by the *American* master is, "that he was first detained by the private ship of war the *Mary*; that the commander, *John Roalf*, desired the deponent to take two of his crew on board, to give the *Mary* a share of the capture, should the said ship be afterwards detained by any other ship of war, which he, this deponent, consented to, but never gave them the command or direction of the said ship." The affidavit of the master of the *Mary* gives a very different representation of the matter: It states, "that he opened the letter delivered to him, and finding that the *French* property on board was not so trifling as had been represented, he resolved to seize; that the appearer, *Henry Smith*, was immediately put on board as prize-master, with a certificate of his situation, and also *George Night*, a mariner of and belonging to the said private ship of war, with orders to make the first *English* port in the *Channel*; that this appearer, *J. Roalf*, did not put any more men on board, by reason that the

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American crew expressly promised to submit and obey the prize-master." On the truth of these different accounts the whole case will depend. Now, with regard to the asserted capture by the *Mary*, the first consideration is, whether the *facts* stated in the master's affidavit are credible: I shall afterwards have occasion to observe what is necessary to constitute capture. On the question of fact, I see no incredibility; if it had appeared, as it was represented in argument, that the *Mary* had at first relinquished the purpose of seizing, on a supposition that the amount of the *French* property on board was too inconsiderable to induce her to seize, and that no circumstances afterwards transpired to lead to an alteration of that purpose; there might have been reason to maintain, that no act of capture was intended by putting the two men on board; but the master says, "that he only *affected* to think the value of the property not *sufficient*, and professed an intention of leaving it, for the purpose of obtaining more evidence of what was actually on board." In that view of the case, I cannot but think that the letter, which was committed to his care to be forwarded to *America*, did contain matter that might naturally induce him to suspect that the *French* property on board was not so inconsiderable, since the terms are not confined to any small Parcels only—but say generally, "*we have French property on board.*" I do not see, therefore, that there is any thing incredible in this representation. But it is said that the conduct pursued was such as never could enter into the mind of any man, to put *two persons unarmed* on board a ship, to take her across the *Atlantic* into a *British* port, in opposition to the resistance which they must expect

expect to encounter, if not from the *American* master himself, yet certainly from the *Frenchmen* on board, who were more in number than themselves. Undoubtedly it was not a very prudent measure; it was, perhaps, an act of rash *confidence*; but when I consider that the neutral master acquiesced by his own account, in taking two men on board, and that it might naturally be indifferent to him whether he went into an *English* or a *French* port, I cannot think that the act is of such a nature as to be altogether improbable. It is true that a cruizer has no right to compel neutral masters to make a promise of this kind; but if they choose to enter into such an engagement, the neutral nation sustains no injury from it; and it is fully competent to the master of the privateer to act under it. It is a mere question of prudence whether he will trust to the word of the neutral master, or whether he will take the more effectual precaution of putting a sufficient force on board. As to the objection, that the papers were not taken into the immediate possession of the prize-master, or that the navigation of the ship was left to the neutral master, I do not see that either of these circumstances are material. The papers remained on board the ship, and it is by no means necessary to constitute a prize-master, that he should take upon himself the navigation of the vessel. If the ship had voluntarily come into a *British* port under this engagement, and proceedings had been instituted in *this Court*, on the part of the first captor, I am not aware of any legal objection that should have prevented the Court from condemning the *French* property on board as lawful prize to the *Mary*. On this part of the case, I do not see that there is either any incredibility, or

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1805.

any illegality, in the account given of the transaction, by the master of the *Mary*. Then let us look at the case as it stands upon the preparatory depositions. The *American* master states on his examination, which I am always to remember was taken in the absence of *Smith*, "that the two men were put on board, only for the purpose of founding a claim to share in any capture that might be afterwards made." The fact itself appears to me to be incredible, that two men should be put on board for that purpose, when it could not possibly have any such effect; and as to the credit of the master, who admits himself to have been concerned in this scheme, what reliance can I place on him as a witness? By his own representation it was a fraudulent act, in which he concurred to give a claim of joint capture where no right whatever existed; and his title to credibility is not much mended, by observing that he was so ready to break the promise which he had so made. It is also utterly improbable that two persons should allow themselves to be made the instruments of such a scheme: since it would be little less than an act of insanity in them, as *British* sailors, to go on board with a chance of being carried into *Havre*, there to enjoy all the luxuries of a *French* prison. Who can find faith enough to believe such a representation? I profess I cannot. I am under the necessity of giving credit to the account contained in the affidavit of the master of the *Mary*; And though the privateer had no right to compel such an engagement, if the neutral master voluntarily promised to go into a *British* port, without more force being put upon him, I am of opinion that the act of seizure under such circumstance would be fully sufficient

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cient in law to constitute a capture. If this be so, it puts an end to the case on the part of the second privateer : If force was all that was required to make the first seizure complete, it would be impossible to ascribe more effect to the *one* man put on board from this vessel, than to the *two* which had been before put on board from the *Mary*. Then, the only question that remains is, as to the King's ship, Whether she can sustain a claim of capture, or an interest of any other kind ? The capture I have already pronounced to have been made before ; but I think there is enough disclosed in the evidence to support a claim of salvage on behalf of the *Pickle*. The prize-master of the *Mary* admits " that he had been informed of an intention of the *American* master, to carry the vessel into *Havre*, and that he applied to the captain of the *Pickle* for assistance." This is in effect an admission that the capture on his part would not have been complete without the aid of the schooner. It is, I think, sufficient to found an interest in the nature of a salvage claim ; and I should have been disposed to consider this claim more liberally, if the proceedings had not in the first instance been carried on in the absence of the prize-master of the *Mary*, and for the purpose of establishing a title of capture, which I have pronounced not to have been well founded. The value of the property condemned is stated to be about £.1,100. I shall pronounce for a salvage, of £.200, with expences.

RESOLUTION.

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1805.

April 30th,
1805.

THE MARIANNA, POSADILLO, Master.

Title of property
—Lien, on
freight, and par-
cel of goods
pledged for
the payment of
the purchase
money of the
ship, not suffi-
cient to found a
claim in a Prize
Court.

THIS was a question respecting the title of property in some goods, and also on the freight (a) of a ship, sold at *Buenos Ayres* by an *American* to a *Spanish* merchant, for which the purchase money had not been paid,

(a) The claim was given “ for Messrs. Brown and Co. of Providence, as the true and lawful sole owners of 750 bales of tallow, and also for 250 bales of tallow shipped on board the said ship at the time of the capture, and the freight of the said ship, to the extent of 20,000 dollars, with expences, or so much thereof as the said 750 bales of tallow shall not produce, for which the said 250-bales of tallow and freight were pledged in part payment of the said ship ” The special affidavit of *Ebenezer Hill Carey*, introducing the claim, stated, “ that the ship had been built at *Providence*, in the month of *April* 1800, for Messrs. *Brown and Ives, John Corlis, and Thomas L. Halfey jun.* That the said ship sailed from *Providence* in the month of *June*, under the command of *Daniel Olney*, for *Amsterdam*; from thence to *London*, and from *London* to *Rio de Plata*, where she arrived in *March* 1801, and then went to the port of *Eufenada*. That the said *Daniel Olney* finding no probability of procuring freight, sold the said ship to a *Spaniard* at *Buenos Ayres*, named *Don Thomas Antonio Romero*, for the sum of 40,000 dollars, which sum was to be paid in *London* in two instalments—the first 20,000 dollars on or before the 2d of *January* 1805, in order to supply funds for which the said *Thomas Antonio Romero* covenanted to ship, and did actually ship on board the said ship 750 bales of tallow, consigned to *Thomas Dickason and Co. of London*, the agents and correspondents of the aforesaid *American* owners of the said ship; and also agreed to deliver, and did deliver to the said *Daniel Olney*, on account of the said owners, the bills of lading for the said goods, to be forwarded to their correspondents in *London*, in order that they might demand and receive the same on its arrival, to whom the same were forwarded accordingly, and are now in their possession, and it was agreed that the said 750 bales of tal-

low

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paid, but was to be satisfied out of the proceeds of a quantity of tallow consigned to *England* on board this vessel for sale.

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JUDGMENT.

Sir William Scott.—This ship appears to have been originally an *American* vessel, sold to a *Spanish* merchant at *Buenos Ayres*, and seized on a voyage to this country, documented as belonging to a *Spanish* merchant, and sailing under the flag and pass of *Spain*. A claim is given on behalf of the former *American* proprietor, in virtue of a lien which he is said to have retained on the property, for the payment of the purchase money; but such an interest cannot, I conceive, be deemed sufficient to support a claim of property in a Court of Prize. Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be over-ruled by liens

low should be insured by the said agents of the *American* merchants, to whom orders were sent by the said *Daniel Olney* to have the same so insured. And it was farther agreed, that the said agents of the *American* merchants having received the said goods, and sold the same, should pay the overplus which there might be over and above the said 20,000 dollars, the premium of insurance thereon, and all costs and charges respecting the same, to the supercargo of the said *Romero*, on board the said Ship.

which

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which could not in any manner come to their knowledge. It would be equally impossible for the Court which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence, which prevail in different countries. To decide judicially on such claims, would require of the Court a perfect knowledge of the Law of Covenant, and the application of that law in all Countries, under all the diversities in which that law exists. From necessity, therefore, the Court would be obliged to shut the door against such discussions, and to decide on the simple title of property, with scarcely any exceptions. Then what is the proprietor's character of the ship. She is described as the property of the *Spanish* merchant, Mr. *Romero*. She is sailing under the *Spanish* flag, and is fully invested with the *Spanish* character, not ostensibly only, but actually, and in the real intention and understanding of the parties. She had been sold to Mr. *Romero*; but it is said that a part of the purchase money had not been paid. *That* objection can have little weight, since it is a matter solely for the consideration of the person who sells, to judge what mode of payment he will accept. He may consent to take a bill of exchange, or he may rely on the promissory note of the purchaser, which may not come in payment for a considerable time, or may never be paid. The Court will not look to such contingencies. It will be sufficient that a legal transfer has been made, and that the mode of payment, whatever it is, has been accepted. Upon this view of the principle upon which the Prize Court has always acted, the ship must be considered to have been legally transferred, and must be pronounced subject to condemnation,

condemnation, as *Spanish* property, which will dispose of that part of the claim which prays for an indemnification to be allowed out of the freight. Then as to the title of property in the goods, which are said to have been going, as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt, will not alter the property—There must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding, that he who holds the bill of lading is to bear the risk of the goods, as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property. It is said that the shipper had covenanted to pay twenty thousand dollars in *London*, and that to supply the necessary funds, he covenanted to ship, and did actually ship these goods, consigned to the correspondent of the *American* merchant in *London*. That might be mere matter of arrangement as to the convenience of the parties, but it can found no title to property, unless it was done with a full transfer of the account and risk at the same time—Who was the shipper, not the *American* but the *Spanish* merchant?—He consigns the goods to the care of the house in *London*, and if they had been lost, the loss would have fallen upon him. The person in *America* could exercise no dominion over them—he could not direct the consignment to be made to the house in *London*. That the transaction was so conducted, was mere matter of convenience and accommodation, but can make no difference as to the principle on which the question of *property* is to be

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be considered. It is said also that the shipper had agreed to send the bills of lading to the person in *America*, that he might forward them to his correspondents in *London*, to enable them to receive the proceeds; and it is intimated that the goods were insured by the correspondents of the person in *America*; but it does not appear how, or in what character; it could not be as *American* property, I conceive, because it is quite clear that the risk of the market was to fall on the *Spanish* shipper. The merchant in *London* was to pay whatever might exceed the demand of the person in *America*, to Mr. *Romero*! and not to the claimant in *America*—No title of property is conveyed to the *American* merchant, but a mere interest in the goods in question, under the form in which the transaction then stood. Suppose that the shipper had thought proper to have paid for the vessel in any other manner, it was clearly in his power to have made such a provision; and it could not then have been maintained that the person in *America* would have retained any interest, much less any title of property in the goods. Upon this view of the claims, which have been given in the alternative, as to the amount of the purchase money of the ship, I am of opinion that the title of property in the ship had been effectually transferred, and that no title of property in the parcel of tallow had been acquired.

In the same case, a second question arose, on a claim of *Jaas Joze de Souza Viana*, a *Portuguese* Merchant of *Rio de Janeiro*, for 400 marquetas of tallow shipped on board this vessel prior to the declaration of hostilities.

On

*On the part of the captor, the King's Advocate contended—*That the claimant was barred by the *Portuguese* treaty of 1654, which established the privilege of free ship, free goods, and contained also the corresponding stipulation, that *property* on board the ship of an enemy should be lawful prize.

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*On this objection the Court expressed a doubt—*Whether this article of the treaty could be fairly applied to the case of property shipped before the contemplation of war, and before the vessel herself had acquired a hostile character—The Court observed that it did not follow, that, because *Spanish* property put on board a *Portuguese* ship, would be protected in the event of the interruption of war, therefore *Portuguese* property on board a *Spanish* ship should become instantly confiscable on the breaking out of hostilities with *Spain*.: That in one case the conduct of the parties would not have been different if the event of hostilities had been known. The cargo was entitled to the protection of the ship generally by the stipulation of the treaty even if shipped in open war; and *a fortiori*, if shipped under circumstances still more favourable to the neutrality of the transaction. In the other case there might be reason to suppose, that the treaty referred only to goods shipped on board an enemy's vessel, in an avowed hostile character; and that the neutral merchant would have acted differently, if he had been apprized of the character of the vessel at the time when the goods were put on board.

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The Court took time to consider the treaty, and on a subsequent day (31st May), having maturely deliberated, directed this claim to be restored (a).

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NEUTRALITET, ZEVEVER, Master.

Blockade, false
destination—
Deviation to the
vicinity of a
blockaded port
—Excuse over-
ruled—Con-
demnation.

THIS was one of several ships with cargoes of wine and brandy, ostensibly described in the ship's papers to be bound from *Bordeaux* to *Embsen*, but taken amongst the *Flemish Banks*, under a suspicion that they were endeavouring to get into *Ostend*. As it

(a) The *Dutch* treaty 1674, which establishes the rule of free ship, free goods, and makes all property on board a ship of the enemy, good prize, contains a farther provision on this head, Article 8. ; and lest any damage should by surprize be done to the one party being at peace, upon the first breaking out of the war with the other party, it is provided and agreed, that a ship belonging to the enemies of either party, and laden with goods of the subjects of the other, shall not by its infection render the said goods liable to confiscation, in case they were laden before the expiration of the terms herein-after mentioned, after the declaration or publication of any such war, &c. (See also the treaty of Commerce at *Utrecht*, Art. 27. - Treaty between *Holland* and *America*, Oct. 1782.) So in the case of the *Falcon*, *Atkins*, in which the sentence of the Council of Prize at *Paris*, was exhibited. The sentence of the Consul at *Leghorn*, which had condemned the cargo belonging to a merchant of *Leghorn*, "as being on board an *English* ship," was reversed, with these observations :

"With regard to the grain which composed the cargo of the *Falcon*, it sailed from *Alexandria* in *Egypt* for its destination, 1st May 1803, 1 *Floral*, 11th year, consequently 20 days before the declaration of war, which could not even be foreseen in so distant a country. The Council therefore accords the Restitution of the cargo the 6th *Geminal*, 13th year."

was a question turning upon points of nautical judgment and experience, the Court was, at the request of the captors, attended by two Gentlemen of the Trinity House.

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On the part of the Captors, the King's Advocate and Arnold.—This is one of several vessels, being nine in number, laden with wine and brandy, and bound on an ostensible destination to *Emden*, but which were all taken about the same time amongst the *Flemish Banks*. In some of them a deviation to *Fushing* under various pretences has been avowed; but the greater part were found making desperate attempts to get into *Ostend*, and though warned off by our cruizers, they still persisted to lie on the coast, till gun-boats could come out to their assistance, whilst the batteries on shore and the horse artillery of the enemy were employed for their protection. Such a combination of endeavour to get these cargoes into *Ostend*, strongly points to the interest which the enemy had in the supply of articles of this description, for the use of their armies in that country. This is the general outline of the whole class. The particular evidence of the present case affords additional proof of a connexion with *Ostend*. It appears that a Mr. *Willen* of *Ostend*, had been instrumental in hiring the crew of this vessel, which is a circumstance not unimportant in itself, and becomes more material, as it tends to confirm the evidence of the pilot, who says, on his examination, that Mr. *W.* of *Ostend*, was to send lighters from shore to receive the cargo. The papers all purport a destination to *Emden*, but it is admitted that the ship was lying at anchor within the *Stroom-sand*, about a mile and a half from *Ostend*. It will

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be incumbent on the party therefore to make out a justifiable and *necessary* cause for a deviation to the very mouth of a blockaded port, since nothing short of some circumstance of paramount necessity can serve as a justification. Two excuses have been set up: 1st, that the master was informed off the *Isle of Wight* that the *Eems* was full of ice, and that he could not prosecute his voyage; 2dly, that his ship was leaky, and he had resolved to go to *Flushing*, and had come to an anchor for the purpose of taking a pilot to carry him to that port. If both these excuses were true, they could not avail in point of law, since they would not prove that there was any necessity of *resorting solely and exclusively to Ostend*. The master ought to have made choice of some other port, to which he might have gone without incurring the same imputation of designing to violate a blockade. But the very fact of an intention of going to *Flushing*, by such a course, is, as it is suggested by nautical men, wholly incredible. A vessel being in a leaky condition, would naturally have avoided the *Flemish Banks*, as a situation of farther danger; and if she had wanted a pilot, she would have gone on, and have borne down after she had got past *Blankenberg*. Instead of pursuing such a course, this vessel is found within a mile of *Ostend*, and *at anchor* with a pilot on board. It is suggested by those who are well acquainted with the coast of *Ostend*, that a ship in a leaky condition would have run greater danger by approaching that port; and it is not to be believed that a pilot would have brought the vessel to anchor there, with a view of carrying her on to the port of *Flushing*. The pilot, indeed, contradicts the whole of this pretence, since

since, he says, " that the cargo was to be delivered into lighters to be carried to *Ostend*," and that supposition is strongly confirmed by the connexion, which the merchant of *Ostend* appears by the papers to have had with the management of the voyage. As to the leaky condition of the vessel, and the credit of the master in making this representation, it appears on inspection that the vessel made only six inches of water in twenty-four hours, and that she was cleared by the pumps in a very short time ; that part of his excuse, therefore, is completely contradicted. As to the other pretext, that the *Eems* was full of ice, *that* will not afford means of contradiction of so precise a nature. But it is understood that the *Eems* was cleared before this time, and that a vessel arrived at the port of *London* from *Emden* on the 25th *February*.

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On the part of the Claimant, *Laurence* argued on the effect of the evidence, as to the situation of the vessel and the intention of running into *Ostend*, and contended, that if the vessel had come to anchor in an open road with a design of going on, it could not, on principle of law, be deemed a violation of the blockade of that port.

In reply, the King's Advocate said, that the ship had anchored in a situation, where, at day-light, she would have been under the protection of the batteries.

JUDGMENT.

Sir William Scott.—This is the case of a ship taken on a professed destination to *Emden*; but the fact is, that she was seized in *Ostend Roads*. Every witness uses the same expression, "*Ostend Roads*," and I understand the situation of the vessel to have been at

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no great distance from that port. The term, *Roads*, undoubtedly, is not a word of very definite meaning; there may be roads which have no immediate connection with any particular port, as the *Downs*. Other Roads are so connected with particular ports as almost to form part of them; and these two descriptions of Roads may be subject to very different considerations. If a ship comes into the *Downs*, which is the common passage and HIGHWAY to the German ocean, and to different parts of *Europe*, it would not be at all just to infer from the mere coming there that she is necessarily coming to a *British* port. But if the Roads are of the other species, there is then reason to conclude that a ship comes there with a view to some communication with that particular port.

From the description given of the Roads of *Ostend*, they are, I think, to be taken as being of the latter species. The ship was lying within a sand, and within the protection of the batteries, and in a place, as I conceive, where ships of large burden are usually unlivered by lighters, as the more commodious method of delivering their cargoes at *Ostend*. If I am correct in that view, a ship going there, must be considered as in the port of *Ostend*; since, for the purpose of enforcing a blockade, it is not necessary to restrict the meaning of the word *port* to the limits of the particular local port regulations, which may not extend beyond the pier-head. A belligerent is not bound to that restricted sense of the word. If the situation of the vessel is within the protection of the batteries, and in a place which vessels usually frequent for the purpose of unlivery, and from which importation into *Ostend* can safely be effected, and is not unusually effected, it would not unreasonably be held to be a part of that port.

But

But I will take the case, as if the vessel *was not in the port*, but only *near* to it. It comes then to be considered how far a neutral ship has a right to anchor in such a spot, where she may have an opportunity of slipping into the blockaded port without molestation. It will not be necessary in the present case to lay down a general principle on this point, but I am disposed to agree to a position advanced in argument, that a Belligerent is not called upon to admit, that neutral ships can innocently place themselves in a situation, where they may with impunity break the blockade whenever they please. If the Belligerent Country has a right to impose a blockade, it must be justified in the necessary means of enforcing that right; and if a vessel could, under the pretence of going farther, approach, *cy pres*, close up to the blockaded port; so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. It would, I think, be no unfair rule of evidence, to hold as a presumption *de jure*, that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence; and essential to the effectual exercise of this right of war.

I do not, however, lay down the general rule on the present occasion, as I think it is not rendered necessary by the circumstances of the case. I will take it on the point contended for, that notwithstanding the suspicions arising from the nature of the situation, it might still be open to the parties, to shew the innocence of their intention by clear and satisfactory evidence, and to exonerate

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themselves from the penalty of the law. We will suppose the question to be only as to the innocence of intention: To determine that, I must consider the motives assigned for the course which has been pursued. The voyage was originally to *Emden*; What produced the deviation? The master in his *deposition* states, "that the ship's course was directed towards *Emden* till the 6th of *February*, when she spoke a small vessel, which informed them that the *Eems* was full of ice, which induced him to go to *Ostend* to get a pilot, as it was necessary, on account of the water made by the ship, that she should be taken into a place of safety." This necessity seems afterwards to be a little disclaimed, since in his affidavit he says that he should have gone on to *Emden*, but for the information received as to the state of the *Eems*;" and another witness, I observe, states, "that they went to get a pilot for *Flushing*."

Now the first question which I wish to propose to *these Gentlemen*, is, Whether this was natural conduct to be pursued by a person in such a situation? I confess it appears to me, from the little judgment which I can exercise on such subjects, that it was not. It might, I conceive, rather have been expected, that the master would have gone on to some other ports, as, to the *Texel*, where he might have waited till the *Eems* was open. It appears to me to be perfectly *unnatural*, that he should have made choice of such a port as *Flushing*, which is of intricate navigation, and not so accessible as the *Texel*, to which he might have gone through an open sea. The second question which I have to propose, *not* as a question of nice nautical skill, but as a point to be decided

decided by the natural conduct of maritime men of ordinary prudence, is, Whether it was a prudent and natural course, that the master should have resorted to such a port as *Ostend*, for the mere purpose of obtaining a pilot for *Flushing*? And I must request you, Gentlemen, to consider it with reference to every thing which you may have read or heard in evidence, as arising from the state of the winds and the weather, and from other circumstances, with the effect of which I may be little acquainted, that might render it a measure, to which a man of ordinary habits of prudence would be likely to resort.

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The Trinity Masters reported it to be their opinion, that a master ought not to have gone to *Ostend* for the purpose of taking a pilot to *Flushing*;—that if there *had been* a leak, as was represented, he should not have stood in within the banks for a pilot.

The Court proceeded—That being the case, I am warranted to pronounce the excuse alledged not to be justifiable. It will be unnecessary for me to consider the other question, as I am of opinion that the ship had been brought into this situation, not with any honest intention, but for the purpose of importing her cargo into *Ostend*.—Ship and cargo condemned.

May 25th,
1805.

THE VRIENDSCHAP, HANSEN, Master.

Prize Act—
Construction—
a *British* ship
unclaimed, docu-
mented as neu-
tral, but with
a paper on
board, suggest-
ing an enemy's
interest, re-
stored on sal-
vage.

THIS was the case of a *British* prize ship taken on a voyage from *Dunkirk* to *Ostend*, both being blockaded ports. No claim was given for the vessel on the part of the neutral owner, in whose name the vessel was documented: But on behalf of the former *British* proprietor, it was prayed, that she might be restored to him on salvage, under the provisions of the Prize-Act.

On the part of the Captors, the King's Advocate observed—That the vessel was documented as neutral property; that the proceedings against her were had on the ground of breaking the blockade; that in such a case she would be condemned as neutral property, and that no room was afforded for the operation of the clause of the Prize-Act, which related only to *British* property re-captured from the *Enemy*.

On the other side, *Arnold* adverted to a paper found on board, expressing “a design of setting out the vessel under a neutral name for the benefit of a person at *Ostend*,” and contended that this discovery was sufficient to overturn the mere formal description of neutral property; and that the Court would be at liberty to consider the property as residing in the person at *Ostend*.

The King's Advocate acquiesced in this suggestion.

The Court decreed the ship to be restored to the former *British* owner, on payment of the salvage; the expences on both sides being first deducted.

(Instance Court).

May 25th,
1805.

THE ELEANOR, ROBERTSON, Master.

THIS was a case of a demand for salvage for services alleged to have been rendered to the vessel on *the Leigh Middle Sand*, on the coast of *Essex*. On the part of the owners, the act on petition stated the place of salvage to have been not the *Leigh Middle*, but the *Chapman Sand*, which was alleged to be within the jurisdiction of the Court of Conservancy of the City of London. On the other side, it was denied that the *Leigh Middle Sand* was within the jurisdiction of the Court of Conservancy of London.

Jurisdiction—
salvage at the
mouth of the
river—*Leigh
Middle Sand*, if
within the jurisdic-
tion of the
Court of Con-
servancy, or
within the
county.

On the effect of this plea the Court observed—It is not enough to aver, on the part of the salvors, that the place of action is not within the jurisdiction of the Court of London; it may still be within the body of the county.

On the part of the Owners, *Arnold* stated—That in the case of the *Hercules* (a), a prohibition had been obtained as to the *Black Tail Sand*, a spot, two or three miles lower down, than either of the Sands alleged in the present case.

On the part of the Salvors, the King's Advocate—It is contended on our part, that the limit of

(a) *Baxter and Others* against *Reeder*, in the ship *Hercules*.—All the particulars of that cause that can be collected, as the case is not reported, are, that a libel had been given in, but, on rule being granted to shew cause, why a prohibition should not issue, the Court of Admiralty abated from further proceeding, (b). The case was contested, and the party was ordered to declare in prohibition, but what passed at the hearing, is not known. The plaintiffs afterwards obtained a verdict at Guildhall, Dec. 11, 1792. This information is extracted from the papers of the Gentleman who was proctor for the salvors in that case, and was restrained.

(b) *Adm. Inq. R.*
4th Dec. 1792.

The
ELEANOR.

May 25th,
1805.

the jurisdiction of the City of *London* is, also, the limit of the River, and that this service was beyond both. If the Court of Admiralty does not entertain the demand, it is to be feared that the salvors may be left without redress.

Court.—They may go to the Magistrates of the County. I certainly shall not decide the case upon the present vague statement of the evidence, as to the place where the cause of action occurred. The locality is every thing. I should at all events require the facts to be better examined. If it is true as stated, that a prohibition has been granted, as to a place below these Sands, the salvors will only incur unnecessary trouble, and expence, by pursuing the demand further in this Court.

On a subsequent day, Arnold prayed—That the owners might be dismissed.

On the other side it was said—That the cause had been adjourned for further enquiry, and for the supply of more accurate information; that none had been obtained; that the salvors had offered to refer the demand to arbitration, even to the Counsel on the other side, but the owners would not consent to any mode of arbitration.

Arnold.—We have not been able to examine the master as to the place of salvage, but there is a draft drawn by him for assistance received, expressly, on the *Chapman Sand*.

Court.—I shall not dismiss the parties, but I shall require all the circumstances of the case to be well examined before I am pressed to make any decree upon them.

THE NOSTRA SIGNORA DE PIEDADE
NOVA AURORA, COELHO, Master.

June 12th,
1805.

THIS was the case of a *Portuguese* ship taken on a voyage from *St. Andero* to *Cadiz* by *Seville*, with a cargo of wheat and flour, twelve dozen of oars, and six quintals of ochre. The cargo was claimed as free under the *Portuguese* treaty (1654.)

Corn to Spain—
Instructions
F.b. 111, 1805,
applying to
corn carried
between differ-
ent ports of
Spain, as well as
to cases of imme-
diate importa-
tion.

On the part of the Captors, the King's Advocate and Robinson objected—That the privilege of the Treaty could not be taken to extend to the present case; since it applied solely to the question of enemy's property, without including a protection against the breach of any principles of law then existing, or that might be supposed to arise out of the regulations of any future period; that it would not apply to *cases* depending on the privileges of a peculiar trade, such as the coasting trade of the enemy; that in the present instance the voyage was of that nature, being from one *Spanish* port to another, with the additional circumstance of false papers, since the cargo was documented as the property of the master, though he in his deposition disclaimed any interest in it.

On the other side, Laurence and Burnaby contended—That the privilege of *free ship, free goods*, when allowed, was allowed, as well in coasting voyages as in any other course of trade; that this point was decided as to the extent of privilege under the

The
NOSTRA SIG-
NORA DE PIE-
DADE NOVA
AURORA.

June 12: h,
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the *Dutch Treaty* (a); that the present cargo was farther protected by the instructions of His Majesty in Council, 1st Feb. 1805, which direct "The commanders of our ships of war and privateers, not to molest any neutral vessel laden solely with grain, and going to Spain, to whomsoever the said grain may belong, unless it be brought from, or be destined to, a blockaded port."

In reply, the King's Advocate and Robinson said—That in the *Dutch cases*, the principle of law depended upon the stipulations of *Treaty*, in which this article was connected with another that allowed a FREE traffic between the ports of the enemy, especially recognized and confirmed as to its meaning, in an explanatory article (b), signed by Sir W. Temple, at the Hague, 30 Dec. 1675. With regard to the King's instruction, it was observed that they related only to a supply of corn going to the kingdom of Spain, viz. to cases of importation; that this could not be deemed a case of importation, being only a voyage from one Spanish

(a) The *Tonge Jan, Block*, Master, and other vessels taken under convoy of two French frigates, going from Port Louis to the Texel—Lords, Feb 1759.—In a note to an old case, (the *Friendship*), it is stated, that the question upon the construction of the Treaty with the Dutch, whether a Dutch ship bound from one enemy's port to another enemy's port, should protect the cargo, was solemnly determined in favour of the claim, by the Court of Appeal, the Lord Chancellor present, in the case of the *Catharina Joanna*, from Cadix to Dunkirk, 28 June 1746.

(b) *Chalmers's Coll. of Treaties*, vol. 1. p. 191.

port to another, which might be made subservient to the purposes of the internal trade of *Spain*, in other articles besides corn, as, in the present instance, in carrying articles for naval use.

The
NOSTRA SIG-
NORA DE PIE-
DADE NOVA
AURORA.

JUNE 12th
1805.

JUDGMENT.

Sir William Scott.—This case may be determined without deciding any thing as to the Treaty, on the quality of the cargo, and the instructions which have issued for the protection of corn going to *Spain*. The present cargo consists of 5514 fanegas of wheat, and 70 barrels of flour—These constitute *the cargo*; and although there were on board some other small articles, as 12 dozen of oars, and 6 quintals of red ochre, they are not material, I think, to affect the privilege of the principal cargo, being corn, going, under the humane permission of His Majesty, to an enemy afflicted with famine and pestilence at the same time. It is objected, that this cargo does not come under the literal terms of the instructions, which are described to be for *the importation of corn*, &c. But it would, in my opinion, be no more than the fair interpretation of the humane intention of these instructions, to consider them, as extending as well to the distribution of corn between the provinces of *Spain*, as to an importation directly from any other country. Indeed the indulgence would be in a great measure fruitless without this construction. If cargoes on board neutral ships are entitled to protection, in coming from the North of *Europe* to the northern ports of *Spain*, they are to be protected also, by the spirit of the same instructions, in being distributed afterwards between the provinces of that kingdom. I am therefore disposed to hold this cargo entitled to protection,

The
NOSTRA SIG-
NORA DE PIE-
DATE NOVA
AURORA.

JUNE 12th.
1895.

tion, unless the privilege shall have been forfeited by any fraudulent or improper conduct; since every grant of this kind must be fairly and honourably acted upon; and if fraud is interposed, and the parties resort to subterfuges of ill faith for their protection, they may justly be considered to have forfeited all benefit from the special indulgence which has been granted to them.

It is objected on this head, that the papers are false, and that there has been a gross misrepresentation of the property, since the bills of lading express the account and risk of the master; and there are other papers which seem to describe the outward cargo as having been sold for him. This latter paper does not appear to be signed by him, and therefore it does not necessarily affect him. The bill of lading is rather a stronger document. But when the master comes to his examination, he gives a fair account of the whole matter, so as to induce me to suppose, that the description in the bill of lading must have originated in misapprehension. The paper is certified, I observe, by Mr. O'Brien, the *British* agent. The master, considering him in his public character, might, perhaps, think that what was done before him was conformable to the regulations of this country. Under these circumstances he may be supposed to have signed the paper, either without knowing its contents, or at least without any intention of imposing upon *British* cruisers, and *British* Courts of Justice. It would be treating him too harshly to pronounce that he has forfeited the benefit of the instructions by this conduct. I shall therefore restore the property, but subject to the payment of the captor's expences, owing to the false description which has been given of this transaction in the ship's papers.

THE PURISSIMA CONCEPTION,
ANCRES, Master.

June 17th,
1805.

THIS was the case of a *Spanish* vessel which had been formerly a *British* ship taken by the *French*, and sold to the *Spanish* owner before the commencement of hostilities between *Great-Britain* and *Spain*. A claim was given for restitution on salvage on behalf of *Mathew Warren* the former *British* proprietor.

Prize Act—
Restitution or
Salvage—Con-
struct on as to a
British Prize
Ship, recaptured
from *Spaniards*,
but purchased
of the *French*
before *Spanish*
hostilities—*British*
claim re-
jected.

On the part of the Captor, the King's Advocate contended—That the restitution of *British* property, directed by the Prize-Act, did not apply to the circumstances of the present case. That it related to captures and recaptures, which should be made during the time of hostilities with the State, from which the property was finally recovered. That in this case the property had been duly seized and converted, and acquired by the *Spaniard*, whilst *Spain* was in a state of neutrality as to this country. That it was to be considered therefore in the light of all other *Spanish* property; and the subsequent capture by a *British* cruiser would enure to the benefit of the captor only, without revesting any interest in the former *British* proprietor.

On the part of the former *British* Proprietor, Laurence said—That if the Court was of opinion that this property was not capable of being restored under the general provisions of the clause of the Prize-Act, there was still another ground on which the interest of the former owner might be supported; since it was suggested that the vessel had not been carried into a *French* port at the time of the capture by the *French*, but that she had been taken to *Algeiras*, and had not been legally condemned.

JUDGMENT.

The
PURISSIMA
CONCEPTION.

June 17th,
1805.

JUDGMENT.

Sir William Scott.—On the general question of law, I should be disposed to hold that a vessel taken by the enemy, and condemned, and then sold to a neutral person, would be completely converted, and that the character of the vessel so impressed would not be divested in favor of the former *British* owner by subsequent hostilities. If it appears, however, that the vessel was not carried into a *French* port at the time of capture; that circumstance may be sufficient to shake the presumption, that would otherwise arise in favor of a legal condemnation. I will, therefore, permit the *British* proprietor to give proof as to the defect of condemnation, if he has it in his power. I shall also permit the captor to produce evidence on that point.

(a) 25th Sept.
1805.

On a subsequent day (a) this case came before the Court again, on proof of the sentence of condemnation which appeared to have passed in the Court of Prize at *Paris*, on examinations taken before the Governor of *Algeiras*, and in which it was recited, "that the vessel was an *English* ship, captured within a mile of the *Spanish* coast, on a voyage from *England* to *Malta*."

On these facts, *Laurence* contended—That the sentence disclosed a ground of nullity on the face of it. That a *French* Court of Prize could not proceed on examinations taken before the magistrate of a neutral country. That in this respect the sentence was more defective than those of the *French* Consular Courts in *Norway*; in which the whole proceedings, such as they were; had passed under the pretended authority of the Belligerent nation. That the examination recited another fact also which ought to have prevented the capture altogether, and have entitled the vessel to protection, since

HIGH COURT OF ADMIRALTY.

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since it was declared to have been taken within the distance from the coast of *Spain* to which the *protection of territory* extends.

The
PURISSIMA
CONCEPTION.

JUNE 17th,
1805.

JUDGMENT.

I do not see sufficient reason to distinguish this case from that of the *Henric* and *Maria*, which I understand is yet suspended for sentence before the Court of Appeal. Although the ground of that decision, in this Court, was not such as I should have approved in principle, if it had not been in some measure forced upon me by the practice of my predecessors, it is the rule to which I shall adhere, until the superior Court has given a decision upon it. As to the other point, That the ship ought to have received protection from the *Spanish* government, it does appear, undoubtedly, on the face of the sentence, that the capture was made in a place where the laws of amity and good faith would impose a duty of protection upon the *Spanish* government. But it is a known principle of this Court, that the privilege of territory will not itself enure to the protection of property, unless the State from which that protection is due, steps forward to assert the right. In this instance the Government, from which the protection was undoubtedly due, did not think proper to vindicate those rights; and it is not competent to the party to whom the property belongs to avail himself of the plea. I must therefore pronounce this ship to have belonged to the *Spanish* owner at the time of capture, as property acquired *jure belli* by the *French* captor, and duly transferred, before the commencement of hostilities between this country and *Spain*. The title of the *British* proprietor being divested, the ship must be condemned as prize to the captor.

SEVERAL

SEVERAL DUTCH SCHUYTS.

June 18th,
1805.

Head-money—
Ships of war,
how considered,
—Commission
of war required
to entitle captors
to head-money.

THE King's Advocate stated—That these were *armed vessels* taken from the enemy, and described as transports; but that it was doubted, whether this description would entitle the captors to the reward of head-money under the Prize-Act, as it did not appear that the ships had any commission of war.

Court.—They may be armed only for their own defence; as they have no commission to act offensively, they cannot be considered legally as *ships of war*, to the effect of entitling the captors to head-money.

Pronounced—Not due.

So in the case of a *Spanish* ship, 4th July, armed as a *packet*, belonged to the king of *Spain*,

The Court said—That it did not come within the description of ships for which head-money was due. That it was necessary that the vessel should have been a commissioned vessel of war, to warrant the Court to pronounce for head-money under the Act of Parliament.

June 20th,
1805.

THE SUSANNA, SMITH, Master.

Monition to pro-
ceed to adjudi-
cation for a
prize vessel lost
at sea, lapse of
time, &c. &c.

THIS was a case on a monition prayed against the captain of His Majesty's ship *Arab*, to proceed to adjudication on a vessel and her cargo, which had been

been seized as prize by the *Arab* in September 1799, and had been upset and lost under the management of the prize-master, owing to his *asserted* misconduct, in crowding too great a press of sail, to join in chase of another vessel, which the *Arab* was then pursuing.

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1805.

On the part of the captain of the Arab, the King's Advocate.—This is not a case, in which the captors are bound to proceed to adjudication, since the vessel has not been carried into port. The Prize-Act imposes this duty *on all captors bringing prizes into port*; until that time, if a vessel is lost, without any imputation of blame on the captors, they are entitled to be dismissed without instituting proceedings. The grounds on which this suggestion is made are, besides, not sufficient in point of evidence to support the charge, since there is nothing more than the affidavit of the correspondent in *London* averring his belief that the facts alledged are true. It is to be remembered also, that the act complained of happened so long ago as 1799, during the last war, and that no satisfactory cause has been assigned why the owner has not prosecuted his demand before. It would therefore be necessary to shew that due diligence to that effect had been used. Nothing is produced, but an apology that the owner had delayed to enter his complaint, on account of the embarrassed state of his own circumstances and his ignorance of the law. If the facts alledged were to be examined now on the representation of the claimant, they would fail to make out a case of misconduct, or unjustifiable seizure, which would be necessary to fix the captor with a responsibility for this loss. No papers are produced to establish this point,

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whether the seizure was justifiable, or not, on which the whole of the application must depend. As to mismanagement, the general presumption is in favour of the captors, who must be supposed to act with a due regard to their own safety, and the preservation of the property which they were prepared to consider as their own. Under these circumstances the Court will not think itself bound to call on the captor to proceed to adjudication.

In support of the motion, Laurence and Swabey.—The distinction as to property not brought into port, is not maintainable. Captors are equally charged with responsibility for property seized as prize from the moment of detention. From that moment the act is either a justifiable or a wrongful act. The captors are the persons in possession of the goods, and of the papers by which the legality of the seizure is to be tried; and the only method of ascertaining that point is, by proceeding to adjudication. On principle of law, therefore, no distinction can be maintained as to the fact, whether the ship is brought into port or not—The captors are in either case equally bound to proceed for their own justification. As to the objection arising from the lapse of time which has intervened, that also is repelled, by observing, that the papers have been in possession of the captors, and that the delay in instituting earlier proceedings was a neglect of duty on their part, rather than any laches to be imputed to the claimant. It is not to be understood, however, that there has been all this intermission on the part of the claimant. He proceeded in the first instance to make the loss a matter of representation to his own government;

government ; and it was not until he had had an opportunity of consulting Mr. *Pinckney*, that he was advised to make his application to this Court.

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JUDGMENT.

Sir William Scott.—This is a call on one of the King's officers to proceed to adjudication on a ship, which was seized almost six years ago. The fact on which the application is made, is therefore of a very antiquated date ; at the same time I will not say, that mere time alone would be an absolute bar, if the claimant had shewn that he had used due diligence, and that he had been prevented by circumstances of inevitable and incurable necessity from prosecuting his demand in due time. The affidavit on which the motion is introduced, states only, " that the ship was seized as prize at sea, that certain persons were put on board, that the King's ship parted in chase of another vessel, that this schooner joined in the chase, and by carrying too much sail was upset and lost." The vessel was not brought into port. The obligation on the *captors* to institute proceedings may, therefore, I think, be held not to attach quite so strongly, as when a ship is brought into port, when the captor has taken complete possession, and is bound by the express directions of the Prize-Act to proceed to adjudication. Whilst the ship is at sea, he may deliberate, and after mature investigation discharge himself of the custody. He may remain liable for misconduct in having detained at sea, but the obligation to proceed, in the direct question of Prize, is not so imperative upon him, as in a case where the vessel is actually brought in. If any inconvenience is to be apprehended from delay, that will be sufficiently counteracted by the opportunity

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tunity which the other party has of instituting proceedings, and of calling upon the captor to compensate for the detention, under another form than that of a Prize Proceeding. Under the circumstances of the present case, I cannot say that *any laches* is imputable to the captor; still less *such* as will remove the imputation of delay that is chargeable on the other party. The *onus* lay upon the claimant. He ought to have proceeded, and within a reasonable time. The affidavit of Mr. *Thomson* states, "that the vessel had been seized as prize;" though the accuracy of that expression may be a little doubted, since I see that on the next day, after overhauling the vessel, the cargo was directed to be stowed again, as if all deliberation was not over, and as if the act of seizure had not definitively taken place. The ship and cargo might have been liberated; but the *Arab* chased, and this schooner was made to join in the pursuit. That was an improper act undoubtedly; because if you seize a neutral vessel for the purpose of examination and search, you have no right to employ that vessel as an instrument of capturing other vessels before adjudication. But by whom was this done? It is stated, in the affidavit, "to have been done by the prize master, and the men put on board." I do not say that Captain *Capel* would be entirely exonerated on *that* account; because, if the persons were put on board by his authority, he might upon strict principles of law be answerable for the proper execution of his orders. But it is something to be considered, in a case depending so much upon circumstances, that the ground of complaint is not a matter personally imputable to the officer, against whom the demand for reparation is now made. Then as to the point at issue,

Whether

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Whether the loss was occasioned by too great a press of sail? I can perceive very great difficulty in arriving at any satisfactory conclusion on a question so propounded, and under the contradictory evidence, which the Court must expect to receive upon it, at the distance of six years. If the question had come before the Court, *recenti facto*, it would even then have been surrounded with considerable difficulties; but when it is brought before me at the distance of six years, though time alone will not operate as a bar, yet in conjunction with the conduct of the party, and the increased difficulties that would attend the case, if entertained, it may not improperly produce that effect. It would impose a most unjust burden on Captain *Capel*, at this distance of time, to call on him to answer to a charge of such minuteness as that, which I have stated, when his officers and crew are all dispersed, and the material point of the enquiry is not suggested to have passed under his own immediate knowledge or observation. That the claimant has been involved in embarrassed circumstances, is no sufficient excuse for the delay which has taken place, because it does not appear that the case was laid before the very respectable Gentleman, Mr. *Pinckney*, who has given his opinion upon it, until *December* last, above five Years after the time of the transaction. The ignorance of law, which has been suggested, is in itself not a legal excuse. It is in the present case less deserving of attention, since it is the common principle of the law of Nations, and familiar to the minds of all persons, that the Court of Admiralty is the proper Court for redress of injuries of this nature. If the claimant has mistaken his way,

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and has not pursued his remedy in a proper manner, and in due season, his error should not expose other parties to the inconvenience of being harassed by proceedings at this distance of time, when the very circumstance of delay has unavoidably occasioned additional difficulties in establishing their defence, and on a point, which must at all times have been considered as a question of delicate and difficult discussion,

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1805.

THE HAABET, GIERTSEN, Master,

Evidence—Inconvenience of admitting affidavits on the part of captors, —Such affidavit discountenanced.

THIS was the case of a *Danish* vessel laden with spars and fir timber, taken near *Dunkirk*, on a voyage from *Frederickstadt* to *l'Orient*, and proceeded against for a breach of the blockade of that port. The master had stated in his depositions, "that he was twelve *English* miles from *Dunkirk* when he first made land; that he had shaped his course for the *Channel*, and was steering for *l'Orient* at the time of capture."

On this evidence, *Laurence* contended on the part of the claimant, that it was a case of immediate restitution, and that there was nothing on the face of the transaction that could in any manner justify a demand for captors' expences, which had been intimated on the other side,

On the part of the captors, the *King's Advocate* in reply pressed strongly upon the Court the hardships,

to which persons employed on the blockading service *would feel themselves* exposed, if the vessel was to be released immediately upon the representation of the neutral master, without affording the captors an opportunity of giving their statement of what passed at the time of capture, so far at least as to justify the seizure, and to entitle them to their expences.

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JUDGMENT.

Sir William Scott.—This vessel was going from *Fredericksbadt*, as it is asserted, to *Port L'Orient*, with a cargo of timber. The first source of information to which the Court usually resorts, is the evidence of the persons on board the captured ship. Among the interrogatories that are addressed to them, there are some on which the captors might be supposed to be equally qualified to supply information; The number of the crew, the place of capture, and many other circumstances, which are included in the number of standing interrogatories, are as much in the cognizance of the captors, as of the other parties. The general rule of law, notwithstanding, is, that on all points the evidence of the claimants alone shall be received in the first instance; and if no doubt arises upon that view of the case, the Court is bound by the general law, as well as by the Act of the *British* Legislature, to take those points as fully demonstrated. It is a possible thing indeed, that witnesses may be forsworn, and that much injustice may be done, as in all references to human testimony dangers of that kind may be to be encountered. Courts of Justice must nevertheless proceed on general principles; though they will receive the

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evidence with caution, and weigh it against any test of credibility that can be collected from the nature and complexion of the whole case taken together. The rule by which this Court has always been guided, is, I believe, conformable to the general practice of all the nations of *Europe*, which directs the evidence to be taken from the persons on board the captured ship. The *French* indeed have deviated, and they admit the examinations of the captors; but their proceedings in matters of prize have been of a very shifting nature, sometimes bordering upon piracy, at other times as at present, I am informed, professing to abstain from the capture of a single neutral vessel. It is altogether a system of capricious or temporizing policy, which is not to be held up as a model to a nation, which *pursues* a regular and consistent conduct, upon principles recognized, and adopted from the most ancient times in all the Countries of *Europe*. The rule being then, to take the original evidence of the claimants conclusive, if not impeached, I feel myself bound to pronounce, that the depositions in this particular case are as void of suspicion, as any which the Court is in the habit of perusing. The ship appears clearly to be the property of a merchant in *Norway*. If there is any thing false, or in any degree doubtful in the representation which has been given by the claimants, it is in that part which relates to the place of capture. The master says, to the third interrogatory, "that he was twelve miles from *Dunkirk*, which bore S. S. E." and "that he was taken, as he believes, because he was bound to *L'Orient*." There is no mention of their vicinity to a blockaded

port, as having been suggested by the captor. The mate and the other witnesses speak to the same effect. Then what is there to be placed in opposition to this account? merely a suspicion, arising from the circumstance, that *Dunkirk* happened to be the first land which the vessel made. That the vessel should have gone so far down the Channel before her course was changed, does not appear to me to be so extraordinary, as necessarily to raise a suspicion, that the course was altered for the purpose of getting into that port. As to the quality of the cargo, it affords no ground of inference that is in any way unfavourable to the case. It is a cargo of spars and fir timber, which might be as much wanted at *L'Orient*, as at *Gravelines* or *Dunkirk*. Under this defect of all circumstances of suspicion in the original evidence, the Court is called upon to admit the affidavits of the captors—first, for the purpose of working condemnation; or, if that fails, to save the captors from the payment of any expences which they may have incurred. If I should accede to this demand, the consequence would be, that I must do it upon a uniform principle of admitting affidavits universally and in all cases, though there should be nothing to excite suspicion in the original evidence, and though the language of all the witnesses is as precise as possible. I can come to no such conclusion. It would, I think, be productive of great mischief on all sides; It might throw into the way of captors a temptation to exceed the line of their duty, and the exact bounds of justice and of truth; and it could not fail to impose upon the Court a most unpleasant difficulty in the exercise of

its

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its judicial functions. For how could the Court decide? Counter affidavits must be introduced, which would necessarily be contradictory. Which should the Court believe? Can it be maintained that the preference should be given to the captors? and *that* in opposition to the general rule of law which has given the preference the other way, and which directs, that the property of the neutral claimant shall not be condemned, except on evidence coming out of his own mouth, or arising out of the clear circumstances of the transaction. If this rule is unsatisfactory to captors, It is nevertheless the rule which the law prescribes. It is my duty to take care that the rules of law are observed, and that the rights of war are not exceeded; and certainly in no cases more than in this particular branch of the Law of nations, which must in its nature operate with severe restraint upon neutral commerce: and if, in discharging this duty, dissatisfactions are created, as has been insinuated, I must endeavour to supply fortitude, to treat with proper disregard the unfavourable, but unjust opinions, that any persons may be disposed to entertain. Looking to the depositions, I am obliged to hold that the affidavits of the captors cannot be admitted (a). On the nature of the fact itself
it

(a) 25th of July 1805, in the *Glierktigheit*. The Court had occasion to observe again upon the inconvenience of admitting affidavits to be introduced. Affidavits had been received on an averment that the ship had a flag flying for a pilot to *Ostend* at the time of capture. On the discussion of the contradictory evidence arising on this enquiry—

JUDGMENT.

it might, I think, be expected, that the question of distance or locality should be better fixed than by mere dry affidavits. It does not appear, according to the master's account, that at the time of seizure he was charged with an attempt to get into *Dunkirk*. If his situation had been a ground of suspicion at the time, the attention of the crew might have been called to it ; and though it might be a thing to be done with some delicacy, I cannot but think that some mode of bringing the fact to the notice of the crew, and of supplying information to the Court, might be resorted to, better than by affidavits at a subsequent time. If the vessel was within three miles of *Dunkirk*, and within sight of the town, it might have been pointed out in the presence of both crews ; it is not to be supposed that out of eight *Norwegians*, of whom the captain had a right to select the witnesses that should be examined, if

The
HABET..

Jan 20th,
1805.

JUDGMENT.

Sir William Scott.—The imputation of breaking the blockade has already been pronounced under the assistance of Gentlemen of the Trinity House, not to be supported on a general view of the evidence, and the situation of the vessel. The ship would therefore have been restored on the former hearing, but for an averment on the part of the captors, that a flag was flying for a pilot to carry her into *Osford* ; and that the master admitted in conversation that he was going to *Osford*. Certainly if the captor's evidence could be taken alone, it would be sufficient to substantiate this averment ; but the Court is under the necessity of not taking their representation *alone* ; and if *that* is positively contradicted, the Court finds itself under a dilemma, to which it must always expect to be reduced by admitting such affidavits. When the facts are positively denied, and that denial cannot be invalidated by any adequate means of estimating the credit of the witnesses, there is no other

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1805.

if the fact had been brought to their notice, one might not have been found honest enough to depose to it. Upon the whole of this discussion, I am of opinion that my duty imposes upon me the obligation of resisting such evidence; and I must pronounce that this ship and cargo are entitled to be restored without payment of the captors expences.

other way of proceeding but by laying out of the case all this extraneous matter, and by recurring to the original evidence. The Court cannot attach itself to personal considerations, and say, this is the affidavit of such a *Gentleman*, and that of an *ordinary* person; it cannot decide on grounds so vague and unjudicial, as those of mere rank and situation in life; those are grounds to which it is impossible for me, sitting here, to advert, in any manner that can produce a conclusion. The imputation of direct *interest*, is equal, or perhaps stronger, on the captor, than on the witnesses from the captured ship. The master positively swears that he had not a flag flying; he admits that a flag had been flying at a particular time, and for another purpose, but not agreeing with the representation of the captors; and the two accounts can only be reconciled by supposing that there must have been some mistake as to the time. As to the declaration which is said to have been made, of an intention of going to *Offend*, the master denies it altogether. This is the state of the dilemma to which the Court is reduced, and it will, I hope, put it upon its guard against the admission of such affidavits in future cases. On a view of the whole evidence, I cannot say that the averment of the captors is established. I say no more, *but that it is not established*. That being laid out of the question, the case reverts to its former state, in which it would have been pronounced a case of restitution; I shall therefore now decree this ship and cargo to be restored.

GENERAL HAMILTON, FLINN, Master.

July 4th,
1805.

THIS was the case of a ship which had been purchased in a blockaded port, and had sailed on a voyage from the *Seine* to *New Orleans*, and had been driven by stress of weather into a port of this kingdom, where she was seized. A claim was given for the vessel as the property of the purchaser, a merchant of *America*.

Blockade—
Vessel purchased
in a blockaded
Port—Penalty
how long at-
taching—
Putting into this
Country by
stress of weather
makes no termi-
nation of the
voyage.

In support of the claim, *Laurence* stated—That the vessel had become *bonâ fide* the property of the claimant, and had been purchased out of the proceeds of the outward cargo. That as to the breach of blockade, the ship could not be considered as taken in *delicto*, as she had concluded the first term of her voyage, and had come into a port of this kingdom.

On the part of the Captor, the King's Advocate contended—That the resort to a *British* port was not a voluntary act, but a measure of necessity; that it could not therefore be considered as any termination of the intended voyage, if that could in law be held sufficient to absolve the vessel from the penalty of having broken the blockade, but that such a consequence could not be allowed. That it would be in the power of any purchaser to select a neighbouring port for the first port of destination, for the mere purpose of avoiding the penalty. That the sound principle of law required that the offence should not be extinguished till the vessel had reached *her own port*, and agreeable to this principle is the *Rule* laid down by the States of *Holland* in 1630 (a):

(a) 3 Admiralty Reports, p. 326.

GENERAL
HAMILTON.

July 4th,
1805.

JUDGMENT.

Sir William Scott.—This is a vessel which has been purchased in a blockaded port ; and therefore, unless any just grounds of distinction can be pointed out, it will come under the general rule which has been already applied to cases of that description. It is first said, that the vessel had been purchased out of the proceeds of the cargo of another vessel, but that circumstance cannot avail on a question of blockade. If the ship has been *purchased* in a blockaded port, *that alone is the illegal act*, and it is perfectly immaterial out of what funds the purchase was effected. Another distinction is, that the vessel had terminated her voyage, and therefore that the penalty would no longer attach. It is true, that she had been driven into a port of this country by stress of weather ; but that is not described by the master as forming any part of the original destination, which is represented to have been to *New Orleans*. It is impossible to consider this accident as any discontinuance of the voyage, or as a defeazance of the penalty which has been incurred. **Condemned.**

July 5th,
1805.

CHRISTINA MARGARETHA, HELGENSEN, Master.

Blockade of
Cadiz de facto,
March 1805—
—Remission of
the blockading
squadron—Re-
sultion.

THIS was the case of a vessel that had sailed from *Cadiz*, 4th April 1805, and was captured off *Orfordness* on the 11th of May, and proceeded against for a breach of the blockade of *Cadiz*.

On the part of the Captor, the King's Advocate stated—That it was notorious that the port of *Cadiz* had been blockaded by a *British* Squadron since the month of
of

of *January*; that the master of this vessel acknowledged that he had sailed on the 18th *March*, and that he had been sent back by the blockading ships; that he nevertheless sailed again in defiance of the blockade, on the 4th of *April*, under a pretence that he had been informed by the *Danish* Consul, and had read it in *French* papers, that the blockade of *Cadiz* had been raised.

CHRISTINA
MARGARE-
THA.

July 5th,
1805.

On the part of the Claimant, Laurence and Swabey contended—That the penalty of the blockade did not attach under the circumstances of this case; that the blockade of *Cadiz* was at that time a blockade *de facto* only, since the notification of the blockade of that port was not made till the 25th of *April*; that the blockade *de facto*, imposed by Sir J. Ord as commander of the *British* Squadron, might be relaxed by the same authority; that it had been so relaxed, as there was an opportunity of proving by a certificate from on board another vessel that sailed about the same time, by which it appeared that the Governor of *Cadiz* had communicated to the *Danish* Consul “that Sir J. Ord had announced to him, a declaration that neutral ships might sail;” that this ship sailed in consequence of that relaxation, and did in fact pass in full view of the *British* Squadron, without molestation, and was seized off *Orfordness* by a cruiser, that could not have received any information of the blockade of *Cadiz*, so as to justify the capture on that pretence.

JUDGMENT.

Sir William Scott.—The only question to be considered in this case is, Whether I shall direct the captor’s expences to be paid, because it is, I think, fully proved,
that

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that there has been no breach of the blockade. The vessel came out of *Cadiz*, and was not stopped by any blockading squadron, but by a cruizer in the *Channel*, which was not called upon to sustain the public service, and cannot therefore plead a justification from the nature of any peculiar public duty, that had been imposed upon her. We have heard occasionally a good deal of the blockade of *Cadiz*, without being in possession of any precise and accurate information on the subject : It seems at all times to have been a blockade of a very fluctuating and vacillating nature, and it is impossible not to feel the difficulty which is thrown upon the Court by this manner of keeping up that blockade. If the seizure had been made by one of the squadron which had before been employed on that service, it would have been some proof of the existence of the blockade ; or if there had been any mistake as to the fact, there would have been some plea for indemnification on the part of the captor ; but the privateer which has thought proper to bring in this vessel had no knowledge of the blockade *de facto*, and if it is pretended that the seizure was made under the notification of the 25th of *April*, which had intervened before the capture, it would have been prudent to have applied it only to such ships as might be supposed to have received notice of it. On these considerations I am of opinion, that there is no sufficient ground to grant the captors their expences.

TRIHETEN,

THE TRIHETEN, WALLÉN.

July 9th,
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THIS was the case of a *Swedish* ship taken on the 28th of *May*, on a voyage from *Sables D'Olonne* to *St. Lucar*, and proceeded against for a breach of blockade of that port.

Blockade of
Cadiz by notifi-
cation, 25 *April*
1805—Time for
notice—Vessel
sailing from
Sables D'Olonne,
22d *May*—
released.

On the part of the Captor, the King's Advocate argued—That the ports of *Cadiz* and *St. Lucar* had been put under blockade by notification of the 25th of *April*; that this vessel sailed for *St. Lucar* from a port of *France* on the 22d of *May*; that sufficient time had elapsed to affect the master with a knowledge of this blockade, and that the ship and cargo would be subject to condemnation.

On the part of the Claimant, Laurence.—This is a vessel which had taken on board a cargo of *wheat*, under the permission of the King's instructions of the 1st of *February*. The charter-party bears date the 18th of *April*, by which the different parties contracted for a voyage to *St. Lucar*, and if that port should be under blockade, to some other *Spanish* port. This circumstance is by no means immaterial, as tending to shew, that the original scheme of the voyage could not be charged with any intention of breaking the blockade. The lading went on, and the bill of lading was signed on the 18th of *May*. On the 22d the ship sailed, and it is true, undoubtedly, that so early as the 25th of *April*, a notification had been made by the Government of this country, declaring the port of *St. Lucar* to be under blockade; but it is to be recollected also,

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that

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that almost at the same time, when this notification issued, news arrived that the *British* Squadron had been driven off by the combined fleets of the enemy, so early as the 10th of *April*. It became notorious to the world, from the moment of the declaration being made public, that the blockading force, to which the notification must be supposed to have referred, had been driven off; it was, from the commencement, null, and defective, in the main circumstance that is required to give it operation; and it would be highly unjust to bind down on neutral vessels the observance of a notification, so accompanied by a circumstance that defeated its operation. This case, therefore, is to be considered, altogether independent of the presumptions, that have been held to arise from notifications in other cases; the notification being defeated, the vessel would have been entitled to a warning, if any blockade *de facto* had existed when she arrived; without that notice, it is impossible to contend that this vessel has been guilty of any breach of the blockade.

In reply, the King's Advocate contended—That although the blockading squadron had been driven off, it was not to be presumed that the notification had been renounced, or that no other force was employed to keep up the blockade. On the contrary, it might be supposed that Sir *J. Ord's* squadron would immediately resume its station, as soon as the combined squadron had disappeared. It was equally notorious, that the enemy's fleet had not remained on the coast, but had sailed away, itself an object of pursuit to the fleet under Lord *Nelson*.

The

The Court asked whether it was understood on the part of Government, that the blockade of *Cadiz* had continued an effective blockade under the notification of the 25th of *April*.

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The King's Advocate said, he understood, that it was.

JUDGMENT.

Sir *W. Scott*.—If that is so, I must require the fact to be proved, because it certainly is notorious that the *British* squadron was driven off on the 10th of *April* by a superior force. It must be shewn, that the actual blockade was again resumed. Considering the circumstances of this case, and that the vessel was taken on the *French* coast so long ago as the 18th of *May*, I am not disposed to hold that the mere act of sailing for *Seville* or *St. Lucar* under the dubious representation which we have of the state of the actual blockade at that time, is sufficient to fix upon this vessel the penalty of breaking the blockade.—Ship and cargo restored.

THE CLIO, alias WILLIAM PITT,
SCHAKEN, Master.

July 23d,
1805.

THIS was the case of a ship taken on a voyage from *Antwerp* to *London*, and claimed by the house of *Rucker, Lushington, and Co.* as property which had been accepted by Mr. *Ossy*, their Agent, at *Antwerp*, for their account, in satisfaction of a debt due to them from the bankrupt estate of a merchant of that place, under a licence obtained by them for that purpose, in Feb. 1805.

Licence to purchase a vessel, out of the hands of an enemy merchant, with a view of recovering a bad debt.—If vitiated by a bond to restore, at the conclusion of the war, as given by the Agent in *Antwerp*—not a restitution.

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*In objection to the Claim, the King's Advocate contended—*That the circumstances under which the vessel was accepted, could not have been disclosed to the Privy Council, since it appeared, from the LETTER of Mr. *Osby* to his own CONSIGNEE in London, "That the ship was to be delivered up to the house of *Rucker, Lushington, and Co.* only, upon their giving bond to restore the vessel at the return of peace, or to pay double value," it was to be inferred from thence that the property was at the time of capture vested in him. The terms of the bond for the restitution of the vessel at the return of peace, were sufficient to defeat the effect of the transfer, and to subject the vessel to be still considered as the property of the enemy; as it was held in the *Sechs. Geschwistern*, 4 Adm. Reports, p. 100.

*In support of the Claim, Laurence argued—*That the property was vested in the house of *Rucker, Lushington, and Co.* and not in *Osby*, at the time of capture; the bill of sale had been made to *Osby*, in the capacity and under the description of agent to the *British* house. The necessity of giving bond for the restitution of the ship at the time of peace, was a mere form imposed by the *French* Government during the last war, which did not appear to have been enforced; If the bond shall be enforced, the parties might submit to pay the penalty, instead of complying with the condition; as in the *Surinam* cases, the Lords held, that bonds to return to *Amsterdam* were not to be taken as conclusive evidence of that fact, nor as tantamount to the performance of the condition, so as to lay a ground of condemnation in the Prize Court: That the effect of the bond would be to abate the value of the assignment, but could not defeat the title of the claimants

claimants to receive the benefit, as far as it *might* extend under the grant of His Majesty's licence.

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JUDGMENT.

Sir William Scott.—This case comes before the Court upon the construction of His Majesty's licence, granted to the house of *Rucker and Lushington*, to accept the assignment of the *British* ship, the *Clio*, which was to be made over to them as a satisfaction for a debt due to them before the war from a merchant at *Antwerp*; and as far as the parties themselves were concerned, the transaction appears to have passed in perfect conformity to the application. They employed *Mr. Osy* of *Antwerp*, as their agent, and he acts for them, throughout, in recovering this property out of the wreck of a bankrupt estate. It appears, however, that he gave a bond to the *French* Government for the restitution of the ship at the conclusion of the war, and it is objected, that this circumstance ought to have been disclosed to Government, at the time of obtaining the licence—If known, certainly it ought. The exact state of the transaction ought to be fairly represented; but here is enough, I think, to exonerate the claimant from any charge of suppression, since the licence was obtained in *February*, and the first mention that occurs of the bond was not till the *May* following, which is sufficient to remove from them all suspicion of ill faith in concealing this circumstance.

The whole foundation of the claim is, that what has been done is agreeable to the intention of Government, and I am disposed to think that it is. The parties were not to purchase, but to take from a bankrupt's estate; when Government grants a li-

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cence, it must be supposed to grant all that is necessary to carry it into effect. The claimants could not go to *Antwerp* themselves; they were under the necessity of employing an agent: he, acting as their mandatory, under the licence, might, I conceive, be entitled to recover (*a*) against them, though an alien enemy, a full indemnification for the terms of the assignment. They would be answerable to him if the bonds were put in suit, on their refusal to re deliver the vessel.

Under these circumstances, it is altogether a case very different from that which has been cited, in which the Court *did* think itself warranted to hold a different rule against persons going into the enemy's country, and becoming the asserted purchasers of vessels, which the enemy is induced to make over, either really, or ostensibly, on account of the war. In that case, the fact itself suggested a strong ground of suspicion, and it became necessary, for the purpose of counteracting fraud, that the Court should set its face against such limitations in the pretended act of transfer. In the present instance, there is no reason to doubt the reality of the transfer. In acceding to the terms of the bond, the claimants would do no more than they were bound to do for the indemnification of their agent, and they are, I think, entitled, under the fair construction of the licence, to accept the ship upon these terms, as the only terms, perhaps, upon which it could be obtained.

(*a* See *Kensington v. Inglis*, East's Rep. Vol. 8, p. 273—287. *Wells v. Williams*, 1 Salk. 46. there cited.

THE OMNIBUS, TENNES.

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1805.

THIS was the case of a ship claimed for Mr. *Ruyt* of *Embden*, but appearing by the evidence to be the property of a merchant of *Guernsey*, and placed under neutral colours for the purpose of carrying on the importation of gin from *Holland*.

Ship under neutral colours:—but apparently by the evidence *British* property, trading with the enemy—Claim of Mr. *Ruyt* of *Embden* rejected, as not supported by the evidence—condemnation.

JUDGMENT.

Sir William Scott.—The only question is, Whether this ship and cargo are the property of Mr. *Ruyt*, for whom they are claimed? It is admitted to have been a *British* ship, transferred at the beginning of the war to the father of the *present*, who was also the *former* master; and it is asserted to have been again sold by him to the *present* claimant. It appears, however, that the vessel continued under the management of the *former* master, and in the same course of trade, in which it had been always employed, from *Guernsey* to *Amsterdam*, never once going to the port of her pretended owner; and though the master professes to have corresponded with Mr. *Ruyt*, not a scrap of any such correspondence is produced. The Court has often had occasion to observe, that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, not all the swearing in the world will convince it that it is a genuine transaction. The *present* case has none of the marks of a real transfer upon it. The *former* master is not only continued, but it is made one of the stipulations of the bill of sale, that he shall not be

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removed. How can the purchaser be said to acquire the right of property, under a bill of sale with such a clause, carrying with it a defeazance of the title which it pretends to convey.—I have no hesitation in pronouncing that Mr. *Ruyt* has no interest in this property. The letters from the persons in *Holland*, to Mr. *Priault* of *Guernsey*, intimate as much by such expressions as these, “We advise you not to send back this vessel till we apprize you how things go here.” Would they have written so to the correspondent at *Guernsey*, if the property had belonged to Mr. *Ruyt*, their neighbour, at *Emden*?—These are marks of an interest at *Guernsey*. It is sufficient, however, to pronounce, that the property is not shewn to belong to the claimant. As the ship and cargo are involved in the same transaction, and in the same claim, they will both be subject to condemnation.

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THE JOHANNA THOLEN, OSTERLO.

Coasting trade
of the enemy,
with false
papers; cause
of condemnation
—Ancient
practice, &c.

THIS was the case of a *Prussian* vessel taken on a voyage ostensibly from *Bordeaux* to *Emden*, but actually to *Antwerp*, under false papers.

On the part of the Captor, the King's Advocate stated the case to be that of a vessel carrying on the coasting trade of the enemy with false papers, and contended, that according to the practice of the Court of Admiralty, which had also been affirmed by the Court of Appeal, a vessel taken in that course of fraudulent trade would be subject to confiscation.

On

On the part of the Claimant, Laurence.—The evidence of property as to the ship is complete and satisfactory. It is not a case, therefore, in which farther proof being necessary, the Court may exercise a power of deciding, whether it will receive farther evidence, from persons already appearing to be implicated in fraud. In such cases the Court has refused to admit farther proof, and the consequence has been condemnation. It may be the effect of fraud to draw upon itself judicial *discredit*, with all the consequences to property, which may attend an incapacity of affording credible evidence in a Court of Justice; but beyond that, to contend that a *ship*, clear as to all questions of property, but carrying on the coasting trade of the enemy, even under false papers, is subject to condemnation in a Prize Court, in the way of *penalty* inflicted on an offence, is to go farther than the decisions of this Court have yet gone, and farther, it may perhaps be thought, than it is competent to the nature of a Court of Prize to proceed. The Court will pause, therefore, before it sanctions such a principle in any case. In the present instance, more particularly, all that depends upon the *close and exclusive* character of the coasting trade of a particular country, entirely fails; since the port of destination is *Antwerp*, a place which has been declared a free *port* by the government of *France*, and which therefore stands clear of all objection drawn from the restricted nature of its trade in time of peace. On these grounds it is hoped that the Court will not pronounce this vessel subject to condemnation.

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In reply, the King's Advocate.—The principle of law on which this vessel will be subject to condemnation,
appeared

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appeared so clear and obvious, that it was thought sufficient merely to state the facts in the original argument. If a question is made, however, either as to the propriety of the principle itself, or as to the fact that the Court has already applied it, it becomes material to refer to what has happened in many recent instances, and to what was the more ancient practice of this Court. The principle on which this Country formerly acted, was to consider neutral vessels altogether excluded from the coasting trade of the enemy, under the penalty of condemnation. (a)

In

(a) From a passage in a letter of Sir *L. Jenkins*, (6th Feb. 1667), it may be collected that at that time a vessel, carrying enemy's goods between the ports of an enemy, was held subject to condemnation. He writes in answer to a question proposed to him by King *Charles* the Second, " The question which I am in obedience to His Majesty's most gracious pleasure to answer unto, being a matter of fact, I thought it my duty not to rely wholly on my own memory or observation, but farther to inquire of Sir *Robert Wiseman*, His Majesty's Advocate General, Mr. *Alexander Clerk*, His Majesty's Proctor, Mr. *Roger How*, Principal Actuary or Registrar in the High Court of Admiralty of *England*, whether they or any of them had observed or could call to mind that, in the late war against the *Dutch*, any one ship otherwise free, as belonging to some of His Majesty's allies, having carried goods belonging to His Majesty's enemies from one enemy's port to another, and being seized after it had discharged the said goods, laden with the proceeds of that freight, had been adjudged prize to His Majesty. They all unanimously resolved they had not observed nor could call to mind that any such judgment or condemnation ever passed in the said Court, and to this their testimony I must as far as my experience reaches concur."

From the question so proposed, with respect to the subsequent voyage, we may infer that the consequence was admitted as to the immediate voyage, at least with enemy's property on board.—What effect was ascribed to that circumstance, or whether any distinction was admitted, does not appear. The mere circumstance of carrying

In later times, which have admitted many relaxations in favour of the navigation of neutral states, the penalty

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ing enemy's goods simply could not have been the main ingredient, in the question *as stated by Sir L. Jenkins*, though the preceding letter of the *Swedish* Resident adverts to that alone.

The events which followed, point also to the same principle, whilst they serve to explain the relaxation which has taken place. The admission of *Dutch* ships into the navigation of *France*, had been granted, on the terms of *French* vessels, by Hen. IV. in 1596, as a boon to aid (a) the resources of the rising republic against *Spain*, and that privilege was continued through successive treaties to the treaty of 1647. On the revision of the *French* maritime system under *Colbert*, in 1656, the coasting trade of *France* was intended to be gradually appropriated to *French* subjects by imposing an additional tonnage duty on foreign vessels, which has continued, notwithstanding the efforts made on the part of *Holland* (b) to obtain an exemption. In substance, it is considered as operating to a virtual exclusion in time of peace.

(a) *La Rich. de la Holl.*
p. 166—7.

(b) *De Witt's Letters*, vol. 2.
p. 307, 455, 511, 534, & *passim*.

With a view to the advantage in time of war, the treaties between *England* and *Holland* of 1668 and 1674 stipulated for a liberty to trade to the ports of the enemy during war. And as that article was not sufficiently explicit, an additional article was signed by Sir *W. Temple* at the *Hague*, 1675, which expressly declared "this liberty to extend to voyages between the ports of the same enemy, yet so that this declaration shall not be alledged by either party for matters which happened before the conclusion of the late peace, February 1673-4." This reservation seems to imply, that vessels had been recently drawn into judgment on a different understanding of the principle. As to *Dutch* ships therefore, which were the chief carriers at that time, the relaxation was introduced by Treaty. It was adopted also between *England* and *France* in the Treaty of Commerce at *Utrecht* 1713. When the privilege was so far conceded, it may be supposed to have been extended by easy gradations to other nations.

That this was the progress of the alteration is rendered more probable, from the manner in which this subject is treated in the arguments of Counsel, and in the expressions that fell from the Court, about the middle of the last century. In the war of 1740 and 1744, it was repeatedly contended that neutral ships were

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(a) *Emanuel*.
1 Adm. Rep.
p. 298.

(b) Adm. Rep.
vol. iv. p. 68.
Affirmed by
Lords.

(c) Adm. 2d
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penalty on vessels so *employed*, in an open and undisguised manner, has been reduced to a forfeiture of freight (a). But if that penalty attends the carrying on the coasting trade of the enemy, in an open and undisguised manner, it is natural to expect greater rigour in *cafes* accompanied with a concealment of the purpose, and a falsification of all the ordinary documents, which are by the law of nations required to disclose the real nature of the voyage. In such *cafes* the course which this Court has pursued in various instances, has been to resort to the more strict principle of former times, and to hold the vessel herself subject to confiscation. Two *cafes* on this point are, the *Edward*, *Bartlet* (b), and the *Heffnung* (c). In the former of these *cafes* some observations passed in argument and in the judgment, on the quality of the cargo, which was wine going to the neighbourhood of *Brest*.—The latter was a cargo of wine also going to *Morlaix*. But in *that* *case* the Court observed only on the nature of the voyage

were not at liberty to engage in the coasting trade of the enemy, unless under the privilege of Treaty. It is in one *case* asserted in argument, that in 1704 and 1707, the *Pearle*, *St. Peter*, and the *Pierre Joseph*, were condemned on that ground by the Lords of Appeal; and in the *Goede Pearle*, a *Hamburg* ship, from *Cette* to *Havre*. July 9th, 1747, the Judge of the High Court of Admiralty expressed himself to the following effect:—"It is a *case* which stands upon the law of nations, [in contradistinction to *cafes* under special Treaties] by which neutrals cannot let out their ships to trade from *French* port to *French* port." In that *case*, however, the freight only was forfeited. It appears, indeed, in other instances, that the practice of the Court did not at that time enforce the penalty of condemnation. In the war of 1756, the rule continued the same, and also in the succeeding war. On that principle the *Veranderen*, from *Bordeaux* to *Dunkirk*, 1778, and the *Prosserité*, from *Nantz* to *Dunkirk*, 1779, and other *cafes*, appear to have been restored.

between

between the *enemy's* ports, with a false destination; and expressly noticed the distinction between an open and colourable destination, and the necessity of adhering to the more strict principle of condemnation, in cases aggravated by a falsification of the ship's papers. A doubt has been raised as to the competency of a Prize Court to apply confiscation, as it is termed, in the way of penalty. But that argument has more than once been rejected by the Court of Appeal; and in one case more particularly, when the late Lord *Roslyn* distinctly observed upon it, "that it had at all times been the practice, and must in some measure always attend the questions which a Court of Prize is called upon to decide." (a) As to the concluding argument, that *Antwerp* is a free port, and therefore distinguished from other ports, it is not, in point of fact, shewn in what manner that privilege has been communicated. In no way, however, can it be contended, that the private views which the *French* Government may have entertained in professing to restore that port to its ancient splendor, will vary the principle which this

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(a) The *French* Ordinances have, in very modern times, considered the destruction of papers and several other incidental acts as substantive grounds of condemnation.—From an extract from a more ancient ordinance, framed apparently for the *Spanish Netherlands*, and printed at *Brussels* 1624, it appears that the 55th Article of that ordinance distinctly proclaimed, "That all goods appertaining to the enemy shall be good prize, although found in the ships of subjects, friends or allies; and if they or any of them shall be found to have concealed the goods of the said enemy, or used any plots to hinder the discovery of them, all which appertain to them who have committed the said fraud shall be good prize."

In a Prize order of *Charles I.* in this Country, A.D. 1627, it is declared, "That foreigners attestations, if once discovered to be false, shall for ever after be looked on as not to be credited in any Court."

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country holds itself justified in applying to the ports of a belligerent country generally, and to vessels employed in carrying on the coasting trade of the enemy.

JUDGMENT.

Sir *William Scott*.—Upon the facts in this case, there is no reasonable ground to doubt, that the ship was engaged in carrying on the coasting trade of the enemy with false papers. All the documents purport a destination to *Emden*, but the ship is admitted to have been forcing her way to *Antwerp*, and for the purpose of delivering her cargo there. To allow that the parties could justify such a deviation by the pretence of a subsequent intention taken up at sea, would enervate every rule that could be laid down respecting the coasting trade of the enemy. As to the principle itself, I confess that the impression of my mind has always been agreeable to what has been stated by the King's Advocate, "that the carrying on the coasting trade with false papers, is a ground of condemnation, according to the established doctrine of this Court." I do not mean at present to enter into a discussion of the principle, which the Court has in many instances already applied. If there is any doubt upon the rectitude of that principle, it will be a great satisfaction to my mind to see it corrected by the decision of the Superior Court. Until that is done, I shall not be disposed to depart from the rule upon which the Court has hitherto proceeded. With regard to the distinction that has been drawn from the character of the port at *Antwerp*, I see nothing in the peculiar regulations, which the *French* Government may have wished to form, for the commerce of that port, that can extend to

to neutral ships the privilege of carrying on the coasting trade of *France* to *that* port, on any other footing relatively to foreign states, than to *any other French ports*, acknowledged as such, and not distinguished by any singular regulation whatever. **Condemned.**

THE MARS, MURREY, Master.

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THIS was the case of an *American* ship and cargo taken on a voyage from *Amsterdam* to *Batavia*, though ostensibly described in all the ships papers to be destined to *Baltimore*, and in a letter on board as bound to *Tranquebar*.

Farther proof of ship and cargo—not allowed, to parties implicated in the fraud of imposing a false destination.

On the part of the Captors, the King's Advocate and Robinson.—This is an *American* ship which sailed from *Amsterdam*, as appears by the ship's papers, bound to *Baltimore*; but as the master states, in the former parts of his depositions, to *Tranquebar*. After the examination had been taken, however, but before the master was repeated to his depositions, he begged to be allowed to retract his former representation, and confessed the actual destination to have been to *Batavia*. That account is farther supported by the evidence of another witness. On these facts there can be no doubt that this ship and cargo will be subject to condemnation. It might be sufficient to consider it as the case of a voyage to the colony of the *enemy* from a port not of the country of the shippers, and in that light it would be subject to the principle, which has been laid down with respect to the colonial trade. If it should be said, that the nature of the trade of *Batavia* is not to be considered on the same footing as a trade to the close colonies of the *West Indies*,

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still, as *Batavia* is part of the territory of *Holland*, a voyage from *Amsterdam* to that settlement with false papers, would come under the description of a voyage in the coasting trade of the enemy with false papers. But there is also another principle which will affect this case with condemnation. In the *Rosalie* and *Betty* (a), the returned cargo of a shipment sent from *France* to the *Isle of France* with false papers, was held subject to condemnation, on the ground that the proof of property being defective, farther proof would not be allowed to persons already convicted of a fraud, in the former part of this same transaction. In the present case, it is impossible to deny that a shipment from the Mother Country to the Settlement of the Enemy must be a case for farther proof; If that is requisite, the Court will not, under the precedent of the case cited, hold it to be a privilege, to which parties convicted of a falsification of the necessary documents, in the *immediate voyage* under consideration, can safely be admitted.

On the part of the Claimants, Laurence.—There is no reason to doubt, that the declaration which the master has made of a destination to *Batavia*, proceeded from conscientious motives, and that it discloses the truth of the transaction. So far as his credit is affected, therefore, it is rather strengthened than impeached by this disclosure, and there is no reason to disbelieve the account which he gives of the other parts of the transaction. As to the question of property, he speaks

(a) 2 Adm. Rep. 513.

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with great confidence, and from the best source of information; that the property actually belonged to the claimant in *America*, and that it was derived from the proceeds of an outward cargo, which had come from *Baltimore* to *Amsterdam*. There is no room to doubt, therefore, as to the actual property of the ship and cargo; and if the ordinary practice of the Court should require farther proof to remove the little suspicion that may arise on the destination, and from the interference of the agents at *Amsterdam*, there is no doubt that satisfactory proof can be supplied. Upon what principle then can it be said, that the claimant should not be admitted to give farther proof? Is it to be contended that, if an agent has been guilty of falsification, the owners are therefore to be excluded from giving evidence of their property? It can only be by some imputation on their own veracity, that they can be declared incompetent to make faith in a Court of Justice. If their property is to be implicated in the consequences of a falsification proved against the master, it is necessary at least that they should be affected with a privity in the fraud. In the present evidence there is nothing to affect them. It appears that they had sent a cargo of coffee and other articles to *Amsterdam*, and had given directions for a returned cargo to *Baltimore*. A change of intention took place, in consequence of information, that those articles would sell well at *Tranquebar*, and a letter is produced, containing full instructions to the master to go to *Tranquebar*, and from thence to *Calcutta*. This is the only charge imputable to the owners. If beyond this the agents in *Holland* should have engrafted on their schemes a speculation to *Batavia*, it is a possible

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possible case of fraud in the enemy agent, which the Court would be tender of fixing on a neutral merchant in a distant part of the world, who was under the necessity of reposing confidence in agents in *Europe*. In the application of a rule of evidence, which points more to the veracity of the persons from whom the proof is to come, than to the acts of their agents, the Court will not deny them the liberty of giving an account of their own conduct; in opposition to that of their agents, or affect them with the forfeiture of very valuable property, as a direct and immediate penalty, for the malfeasance of persons employed by them as their agents in *Europe*. The Court will not deny the parties the benefit of farther proof. As to some other topics which have been introduced, the nature of the trade to *Batavia* is so different, either from the domestic regulations of the coasting trade between the ports of *Europe*, and from the closer and more restricted character of the colonial trade in the *West Indies*, that arguments drawn from the analogy of principles relating to those branches of commerce cannot be applied to this case. On that ground it is unnecessary to say more at present, since, if any doubt should be entertained on that head, it can only operate to reserve the case for the result of enquiries, which have been directed to be made in other cases, respecting the particular nature of the trade to *Batavia* in time of peace.

In reply, the King's Advocate and Robinson.—The case is now reduced to a very narrow compass; the fact of a false destination is admitted, and the necessity for farther proof is not denied. The whole argument turns on the responsibility of the principal

principal for the acts of his agents, and on a representation of the hardship of imputing to him the consequences of a falsehood, which, it is said, may have originated with the persons at *Amsterdam*. The rule of law on this point is distinct and familiar to every system of jurisprudence; it is, besides, vindicated against any charge of injury and hardship, by considering that if a case can be supposed to occur, in which the fraud is imputable only to the agent exceeding the power confided to him, it is an act of injustice, for which the principal must be entitled to a legal remedy against him. In the present instance, however, it will be a satisfaction to the Court to perceive, that there is as little danger of affecting the principal for the unauthorized act of a mere agent, as can present itself in any case; since the evidence affords abundant reason to suppose that the whole transaction either originated with the claimant in *America*, or was concerned in communication with him. The cargo appears to have been afforded by the principal in *America*, as the instructions of the master direct him to go to *Amsterdam* and take a cargo which was to be prepared for him, *according to orders already given*. Whatever inference arises therefore from the nature of the articles, from their apparent fitness for the markets of the East, and from their unfitness for the market of *America*, it is to be referred entirely to the act of the principal himself. It will appear farther by that letter, that the trust reposed in these persons in *Amsterdam* was committed to them by the principal; they were not persons chosen, as it sometimes happens in cases of emergency, by the master in a foreign port; they were the confidential agents

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of the principal, and as such, on all general reasoning, must be taken to be more competent to bind him by their acts, and less likely to transgress the limits of a commission entrusted to them. It appears farther by another letter found on board, which is now represented as the authority for the change of destination from *Baltimore* to *Tranquebar*, that the intention was taken up in consequence of some communication as to the fitness of the cargo for that market. From whence is this information likely to have come, but from the agents in *Amsterdam*? If the suggestion of the change to *Tranquebar* proceeded from them, the adventure to *Batavia*, which appears to have been that which was acted upon, would in all probability be suggested at the same time. If the nature of the deviation is considered, it cannot be believed that an agent would take on himself to counteract so directly all the provisions of his employer; since it is not a trifling substitution of one port for another, nearly contiguous and of the same country. The owner, in the letter produced, lays down a plan to be executed on his credit in the *Danish* and *English* Settlements in *India*, and informs the master that he would arrange measures for his reception there, which could not be done but by means of an extensive correspondence; yet all this scheme is set aside, at once, without any apparent reason, and without any adequate authority, unless we suppose that the real interest of the adventure resided in the persons in *Amsterdam*. The suggestion of hardship therefore in this case, if it could in any instance avail against the principle of law, is effectually removed by the necessary conclusion, that the fraud cannot have proceeded from

from the persons in *Amsterdam*, without the privity and acquiescence of the claimant.

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JUDGMENT.

Sir William Scott.—This is the case of an *American* ship, or of a vessel documented as such, and furnished with an *American* register, which came to *Amsterdam*, and there took on board an assorted cargo, which was to have been delivered at *Batavia*. It appears also from the depositions, that the vessel had been engaged in the same course of trade on a former voyage; “that on the last voyage she had gone from *Baltimore* to *Amsterdam*, and from thence to *Batavia*, where she took a cargo of coffee, and proceeded to *Baltimore*, where her cargo was landed and afterwards re-shipped, and delivered at *Amsterdam*, where that voyage was ended, and the present cargo was taken on board, destined, according to the ship’s papers, for *Baltimore* in *America*.” It is a cargo of assorted articles (a) apparently not very well adapted to the *American* market; but rather such as are usually selected for an adventure to the *East Indies*. This appears, even from a letter of the owner of the 12th of *April*, in which he informs the master “that information had reached him that such articles would answer well at *Tranquebar* ;” and I perfectly agree with an observation which has been made, that that letter leads by inevitable consequence to a supposition, that there had been some correspondence or communication to this effect, between the claimant and the agents in *Amsterdam*. The vessel sailed with

(a) Iron, wine, beer, gin, waters, glass ware, tobacco pipes, woollens, hats, oils, brushes, provisions, cards, and sundries.

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this letter on board expressing a destination to *Tranquebar*; but it appears that she was in fact not going to that port, but that the cargo was to have been delivered at *Batavia*.

On this part of the case it is impossible not to observe, that it was a very blameable conduct, even supposing *Batavia* to have been out of the case, to sail with a false representation of the voyage in the ship's papers. The destination is a fact so proper to be known, for every purpose of justification to the belligerent cruiser, and of convenience and protection to the neutral claimant, that if the voyage is changed from the original intention before the ship sails, it should be notified in the ship's papers, and not be left to be disclosed only by a private letter on board, whilst a different voyage remains standing in all the papers, which describe it as a voyage to *Baltimore*, though I must believe that it never was intended that the vessel should go there.

Taking the case then on the lowest footing, on which the rule is settled, as to the penal consequences of such a conduct, that it will preclude the parties from giving farther proof (if that should be necessary) is it a case that requires farther proof, or not? As to the cargo, it cannot be denied that farther proof is necessary; because, as to the master's representation of the property, "that it was going for the account and risk of the owners of the ship," his testimony on that point must be taken, together with his other assertions, "that it was going to *Tranquebar*." It is impossible to separate these parts of the same testimony, and to say, that the necessity for farther proof, as to a cargo put on board at *Amsterdam*, and not supported by a credible

credible verification of the master, must not strike every rational person.

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With respect to the ship, the necessity of giving further proof on that part of the case may not be so apparent, as it was an *American* built ship—But she had run but for a short time, and very much in *Dutch* occupation: The only voyage which she had made before, had been in a course of *Dutch* trade, similar to that in which she was engaged in the present voyage; and if I advert to the suggestion advanced in argument, that these persons in *Amsterdam* may have taken on themselves the management of the vessel, and may have sent her to *Batavia* immediately from their own ports, in opposition to the professed intention of the owner, does not that dominion, exercised over the ship contrary to the will of the ostensible proprietor, raise a reasonable suspicion of *Dutch* interests in the ship herself? The very hypothesis introduces a suspicion of *Dutch* connexion, and renders it necessary to order farther proof even as to the vessel.

Then if farther proof is necessary, let us see from what sources it may be expected to be supplied—From the claimants in *America*, it is said, and it is represented to be a great hardship to affect them as principals by the act of their agents. Whatever the hardship may be, I fear the rule of law is so established, that the principal is answerable for the acts of his agent, not only civilly but penalty to the amount of the property entrusted to his care. It would indeed be impossible for a Court of Prize to affect the proprietor in any way; and whatever the apparent hardship may be, it is very much softened by recollecting that if he has sustained any injury by the fraudulent and

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unauthorized acts of his agent, he will be entitled to his remedy against him. But how stands the fact? I am of opinion that the whole fraud was concerted with the owner, that the cargo was assorted originally for the *East Indies*, and that the letter put on board, purporting a change of intention for *Tranquebar*, was framed and fabricated only for the purpose of colour and disguise. It is impossible that the *Dutch* merchants could have taken upon themselves to alter the voyage, and to make so material a change, without having an interest in the transaction themselves, or without apprizing the asserted proprietor in *America* of what they were intending to do. The letter which has been produced must have come accompanied with some other, approving the change, if indeed the destination to *Batavia* is a change, and is not rather to be taken as the original plan of the voyage. Under these considerations I am of opinion that this case does come under the ordinary rule as to the ship, as well as to the cargo; that farther proof is necessary, and that it is not a case, in which the parties are entitled to supply it.

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THE DOROTHY FOSTER, SOWDEN, Master.

Salvage—
Freight included; when the voyage is commenced, and the freight is in the course of being earned.

THIS was the case of a *British* vessel that had sailed from *Savannah le Mar*, in *Jamaica*, to *Bluefields*, in order to join convoy for *England*, and was in the course of that navigation captured by a *French* privateer, and recaptured by persons who put off in a boat from the

the shore. A claim of *joint salvage* was advanced on behalf of a sloop that was in sight, coming from *Savannah le Mar*, but becalmed, and incapable of getting up. The pretensions of the different salvors having been set forth, the principal question turned upon the quantum of the property liable to the payment of salvage, whether the freight was to be included in that estimate, under the circumstances of the present case.

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On the part of the Recaptors, the King's Advocate and Swabey contended—That the voyage must be held to have commenced; that the ship had sailed from her clearing port, and although she was proceeding to *Bluefields* for the purpose of joining *convoy*, such a provisional destination could not be taken as a suspension of the commencement of the voyage, since it might happen in proportion to the danger that was to be apprehended, that the precaution of taking *convoy* would be adopted at very different periods in different voyages; that the act of sailing was such an *inception*, as would have given effect to any insurances that had been made; and that it was to be considered for every purpose as an actual commencement of the voyage.

On the part of the Owners, Laurence and Adams contended—That salvage was not to be given for the freight, since the actual voyage or *progress* towards the port of destination had not commenced; that the principle of salvage was to be applied only to property actually *saved*, and not to contingent earnings

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ings that might afterwards accrue from it; that the voyage to *England* could not be said to have commenced, as the vessel was only on her course to join the convoy at *Bluefields*; that it was immaterial to enquire, whether insurance would have attached or not, since that was a matter of contract merely, and would depend upon the terms of the policy. An insurance might run from the time of shipment, and whilst the vessel lay in port; but the rules which govern contracts of that nature, could be no guide for the Court, in considering whether or not a salvage service had been effected as to the freight in this instance.

JUDGMENT.

Sir *William Scott*.—There are two questions in this case—one relating to the salvors, the other to the amount of the property, on which salvage is to be decreed. As to the first, it appears from the evidence of persons who are entirely disinterested, that the crew of the *sloop* could not have effected the recapture; since that vessel had been separated, and was becalmed, and could not have got up. However active their intentions might have been, the wind did not favour their exertions. The actual captors were those who came off in a boat from the shore, by whose approach the instant terror was occasioned that intimidated the *French*, and compelled them to quit their prize—These persons must therefore be pronounced to be the sole salvors.

As to the second question, Whether a salvage is due on the freight, that will depend on another question of fact, Whether the freight was in a course of
 II being

being earned? because I cannot go the length of holding that it would be sufficient that the ship was *enabled* to earn freight by the act of recapture. If a vessel had been cut out of port, and had been afterwards recaptured, it could not be contended, I conceive, that salvage would be due on the freight accruing on the *following* voyage. Therefore the question recurs, Whether the freight in this instance was in a course of being earned? The Court, in giving salvage on freight, makes no separation as to minute portions of the voyage. If a commencement has taken place, and the voyage is afterwards accomplished, the whole freight is included in the valuation of the property on which salvage is given. Then was the ship in a course of earning freight? Had she commenced her voyage? As far as I can collect from the affidavits, the voyage was commenced. The ship had sailed from *Savannah le Mar*, in *Jamaica*, and was going to *Bluefields*, another port of that island, for the purpose of joining convoy: She might be under engagement to call for convoy, and yet be *in itinere*, as to her own voyage. Considering that the commencement had taken place, and that the voyage was afterwards successfully terminated, and that the Court is not in the habit of giving salvage, *pro rata itineris*, I am of opinion that the case does come fairly within the general rule, and that the freight should be included.—One-sixth given on ship, cargo, and freight—Total value £125,000.

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THE FRAU MARGARETHA, STRUER, Master,

Contraband
Dutch cheese to
Quimper, if con-
traband, distinc-
tion from the
case of the *Jonge*
Margaretha.
Further proof of
property.

THIS was the case of a cargo of *Dutch* cheese taken on a voyage from *Amsterdam* to *Quimper*.

On the part of the Captors, the King's Advocate argued—That cheese of this quality had in the decisions (a) of the late war been condemned as contraband, when going to *Brest*; that *Quimper* was in the immediate vicinity of *Brest*, and that a destination to *Quimper*, whether real or ostensible, could not be considered in any other light than as an actual destination to *Brest*, under a mask to protect these articles in their course to the naval arsenal of the enemy.

JUDGMENT.

Sir William Scott.—A destination to *Quimper* cannot, I think, be considered as such an identical destination, with a voyage to *Brest*, as to bring this cargo under the authority of the case (a) which has been relied on. I am not disposed to hold that these articles on this destination are so clearly contraband, though certainly very near it, as to preclude the claimant from giving further proof of the property.

Farther Proof ordered.

(a) *Jonge Margaretha*, 1 Adm. Rep. p. 189.

THE LEIFDE AND JACOBINE, CROSS,
Master.

July 25th,
1805.

THIS was a case on the effect of a monition to deliver up a certain cargo, to which a return had been made that the party had not the cargo in his possession. Practice—Style of monition, &c.

The King's Advocate contended—That the return was not sufficient, and moved the Court to grant an attachment, on a suggestion, that it was now admitted that the cargo had been sold by the party, and that the possession of the proceeds was to be taken as equivalent to the possession of the cargo.

The Court observed—The terms of the monition might have expressed “*the proceeds as well as the goods* ;” The present instrument has been confined solely to the cargo ; it would therefore be too much to extend the construction to the effect of granting an attachment ; it will be more adviseable that another monition should be taken out as to the proceeds.

So decreed.

THE ZELDEN RUST, ROZENNA, Master.

July 26th,
1805,

THIS was the case of a cargo of *Dutch cheese* taken on an asserted destination from *Amsterdam* to *Corunna*. Contraband Dutch cheese to Corunna, condemned—Distinction from the *Fran Margaretha*.

On

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ZELDEN RUIT.

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On the part of the Captors—A joint affidavit was produced from the store-keeper of His Majesty's yards at *Yarmouth*, and a dealer in articles of this kind, which described the cheese to be fit for naval stores, and such as is usually served on board *French* and *Spanish* ships of war.

On these facts the King's Advocate argued—That a destination to *Corunna* was in fact a destination to *Ferrol*, since those ports were both in the same bay, and so situated as to render it impossible to prevent supplies from going immediately to *Ferrol* for the use of the *Spanish* navy, if they were permitted to enter the bay un molested, on an asserted destination to *Corunna*.

On the part of the Claimant, it was contended—That *Corunna* was not a port of naval equipment, and that this case was entitled to the same considerations as (a) *Supra*, p. 92. were applied to the *Frau Margaretha* (a).

JUDGMENT.

Sir William Scott.—It certainly has been held by the Court, that cheese going to a place of naval equipment, and fit for naval use, is contraband. As to the quality of the cheese, in this instance, there is, I think, sufficient to satisfy the Court, from the representation given of it by a person conversant with this particular article in the way of his trade, and by another person who is employed in the capacity of store-keeper at *Yarmouth*. The quality may therefore be fairly assumed on the declaration of their judgment; and if going to a place of naval equipment, it will fall under the rule of law that has been applied to other cases.

Corunna

Corunna is, I believe, itself a place of naval equipment in some degree, and if not so exclusively, and in its prominent character, yet from its vicinity to *Ferrol*, it is almost identified with that port. These ports are situated in the same bay, and if the supply is permitted to be imported into the bay, it would, I conceive, be impossible to prevent it from going on immediately, and in the same conveyance, to *Ferrol*. There is, in this respect, a material difference between the present case, and the case which happened yesterday, of similar articles going to *Quimper*. That port, though in the vicinity of *Brest*, is situated on the opposite side of a projecting head land, or promontory, so as not to admit of an immediate communication, except by land carriage. Without meaning to interfere with the principle of that decision, I think myself warranted to consider this cargo on the present destination as *contraband*, and as such subject to condemnation.

Condemned.

THE PRINTZ HENRICK VON PREUSSEN,
SEPHES, Master.

August 14,
1805.

THIS was the case of a motion on a return to a monition which had been taken out on the part of the petty officers and crew of His Majesty's ship the *Spitfire*, against Mr. *M'Adam*, the agent, calling on him "to exhibit his account on oath in the Registry of the Court, within fifteen days after service of the monition, and to proceed to the immediate distribution of that part of the proceeds belonging to the officers and crew of the *Spitfire*, and certify to the Judge that he had so done. The return set forth, that

Monition to distribute under act, 27 June 1805, sect. 7. Quære, if an agent is justified in delaying distribution to cover the accounts of another unsuccessful capture made by the same ship.

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PRINTS HEN-
RICK VON
PREUSSEN.

August 18,
1803.

that the *Spitfire* having, in the month of *April* 1801, in company with His Majesty's ship of war *Renard*, captured the prize, the usual proceedings were had in this Court and in the Court of Appeal until the 14th of *November* 1803, when no libel being given on the part of the claimant, the inhibition was decreed to be relaxed; that after the settlement of the cause, the agents for the *Renard* drew up a statement of the account, and Mr. *M^r Adam* paid to them the sum of 2,768*l.* 2*s.* 8*d.* the proportion of the proceeds due to the *Renard*, leaving in his hands the sum of 2,909*l.* 16*s.* 6*d.* as the proportion belonging to the *Spitfire*; that in *December* 1800, the *Spitfire* captured a vessel called the *Vrouw Elizabeth*, *Ackerman*, master, and brought her to *Falmouth*, and having commenced proceedings in the High Court of Admiralty, the ship and cargo were claimed; that on the 5th of *March* 1801, the ship was restored, and on the 16th of *February* 1802, the cargo was also restored; that having been previously sold under the authority of the Court, the nett proceeds amounted to only the sum of 30*l.* 5*s.* 7*d.* which the claimant refused to accept as a restitution; and having insisted on a compensation from the captors for the damage sustained by the cargo, the same was referred to the Registrar and merchants to report thereon; that Mr. *M^r Adam* was only then very lately made acquainted with the extent of the claimant's demand; and that, according to the account rendered into Court on the 11th of *December* 1802, the value of the cargo was estimated at 445*l.* 3*s.* 9*d.* and that he was only the day before advised that the Registrar and merchants did, on the
7th

5th of May 1805, make their report thereon, but that he was not then informed of the amount of the expences incurred in that cause.—In a farther certificate of the distribution, dated the 26th of July 1805, it was stated, “ that in pursuance of a notice in the *London Gazette* of the 25th of May last, the agent’s son did, on the 28th of June, pay unto all the parties, officers, and seamen, who were entitled, and who personally called for the same, their several proportions of the proceeds; and that on the 12th of July he paid to their agents and attornies, who called for the same, and produced legal authorities, the several proportions due to them, and that there only remained in his hands about 700 *l.* which he was ready to pay.”

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PRINTZ HER-
NICK VON
PREUSSEN.

August 18,
1805.

In support of the Monition, the King’s Advocate.—
Condemnation in this case passed in May 1801: It is true that an appeal was entered, but it was *not prosecuted*, and the inhibition was relaxed 10th November 1803. The agent, nevertheless, retained the proceeds to the amount of 2,090 *l.* for several months, under an excuse that in some other case belonging to the same vessel, the proceeds of that capture would not be sufficient to make restitution. It is of great importance to resist such a plea, since, if it can avail in law, it will render the provisions of the Act of Parliament perfectly nugatory. It is not a justifiable excuse for delay, in one instance, to say, that there are accounts outstanding of other prizes taken by the same ship. The crew may either in whole or in part not be the same; it is material, therefore, that the Court should discountenance such *plea*, which, by resorting to the complicated accounts of other captures, would render

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the regulations of the Act of no effect. On the facts, the futility of the excuse will appear by the particular items of the account. In the outstanding account of the unsuccessful capture, the whole demand of the claimant was only 330*l.* of which 30*l.* is admitted to have been provided from the proceeds. There was evidently, therefore, no reason for the detention of so large a sum for restitution in the other case, if that could in law be deemed a legal excuse.

On the other side, Ladurence.—The monition calls on the agent to pay in the money, or proceed to distribution, which has been in effect complied with, as an advertisement has already been inserted, and the distribution has been made of the whole sum except 700*l.* which the agent was also ready to pay. This explanation would, it is apprehended, have been satisfactory to the parties, if they had called upon the agent personally in the first instance. Instead of giving him that opportunity, they have brought him somewhat vexatiously before the Court. Until the end of 1803, the interest in the present prize was altogether suspended by an appeal. When that was concluded, the accounts of another capture were unsettled; on which a very important question presents itself, Whether it is not allowable to connect the two accounts, so as to provide for the indemnification of the commanding officer, at whose risk the expences are incurred? It would indeed be a ruinous system to hurry on the distribution of successful captures to the common mariners, and to leave the captain responsible for the result of other captures, which may have been made by the same ship's company, and
which

which may be depending at the same time. Additional expence would also arise from a necessity of proceeding to *separate* distributions. Under these considerations the Court will, it is hoped, be of opinion that this monition has been needlessly extracted, and direct the agent to be dismissed.

The
PRINCE HEN-
RICK VON
PRUSSEN.

August 18,
1805.

JUDGMENT.

Sir *William Scott*.—It would, I think, be improper in the present case, which is the first that has arisen on the late Act (*a*), to dismiss the party on this return; and I do not perceive that it can be of any inconvenience to him to be held before the Court, until such time as the unclaimed shares are paid over to *Greenwich Hospital*. The monition was extracted at the suit of the petty officers and crew. The tenor of that monition is to call on the agent to distribute, and to certify to the Court that he has done so, which, it is contended, *has already been performed*, because the distinction is begun. I conceive the meaning of the Act to be, *that he should complete and settle the distribution*, and that it is not enough that he should have barely begun, and then lie by. As no inconvenience is likely to ensue to the agent, and as there is nothing in the proceeding which tends to cast any stigma on his character, I shall certainly not at present dismiss him.

Then with respect to the expence of the application, the agent has shewn, by complying with the monition, that it was not altogether unfounded. The return sets forth, that the accounts of another capture were not settled, and that the captain advised him not to

(a) Prize Act, 27th June 1805, sect. 71.

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BICK VON
PREUSSEN.

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distribute, except to the officers, until those accounts should be liquidated. It appears to me that this advice was neither proper to be given, nor to be received, and that the agent should not have acted in compliance with it. When a prize has become a vested interest, the parties in distribution are entitled to their share; and if the captain makes another seizure, he is answerable for the discretion of that act.

Laurence.—The other seizure which had been made by this vessel was a prior seizure. I may be permitted to observe also, as this is a new question, that it is represented to have been the practice invariably pursued in the navy to discharge unsuccessful seizures by other prizes belonging to the same vessel, and that it is felt to be a question of great moment and importance to commanding officers, Whether this practice shall be continued or over-ruled.

Court.—The circumstances of the present case do not render it necessary for me to give a decided opinion upon the general law, and therefore as it is pressed as a point of considerable importance to the navy, I wish to be understood to determine this case on its own particular facts; though speaking hastily, I do not see that the practice described can be sustained by the Court, except in cases where a general consent to such an effect is shewn. It appears to me that the application was proper to be made to the Court, and that the petitioners are entitled to be indemnified. Without meaning to express any thing vindictive or in a tone of censure and indignation, I am of opinion that the justice of the case requires that the agent should be condemned in the expences of this proceeding.

THE CHARLOTTE CHRISTINE, PETERSEN,
Master.

August 1st,
1805.

THIS was the case of a *Danish* vessel, with a cargo of fir timber, taken off *Cape La Heve*, and proceeded against on the ground of a breach of the blockade of the *Seine*.

Blockade—
Hewe—Approximation to the blockaded port, so as to expose the blockaders force to the batteries on the coast, &c. not admissible, under a purpose of taking a pilot for a neighbouring port.

On the original depositions the master had stated—That he was bound from a port in *Norway* to a market in *France*; that he was apprized of the blockade of *Havre*; that on his passage he was warned not to enter any of the *French* ports as far as *Fecamp*, which were put under blockade, 9th of *August* 1804; that he came to *Beachy Head*, and sailed from that port with an intention of proceeding to *Caen*; that he had come off *Cape La Heve* for the purpose of taking a pilot for *Caen*; that he had sailed in sight of the *British* frigates for some hours before the capture, and that he had brought to on the first appearance of the boat that came off to examine him; that he was actually sailing for *Caen*, and had no intention of breaking the blockade of *Havre*. Permission was given to the captors to answer this representation, and affidavits were now exhibited from the commanding officer, and other officers and men of the capturing vessel, which stated the vessel to have been in tow by a pilot-boat, and making for the shore when she was first hailed; that she refused to bring to, until the captors were obliged to fire a shot at her; that she was so near to the shore as to be almost under the protection of

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the batteries ; and that several shot were fired from the batteries at the capturing boat ; that she was steering in for the shore when she was first perceived.

JUDGMENT.

Sir William Scott.—This ship was bound with a cargo of deals to a port of *France*, being consigned to the master with a discretion to find a market for his cargo, as he had an undoubted right to do in any port of *France*, which was not blockaded. To *Havre* he was not at liberty to go, since he himself admits that he knew that port to be under blockade. He came to *Beachy Head*, and there determined to proceed to *Caen*, and sailed with a fair wind on the evening preceding the capture. He came in sight of the *French* coast between four and five o'clock the next morning, so that he had the benefit of the whole day for deliberation, if any difficulty occurred, as he states the port of *Caen* to be of difficult entrance and approach.

According to the master's account, it was only for the purpose of taking a pilot for *Caen*, that he made for *Cape La Heve* ; and that is represented to be the point where pilots usually ply for *Caen*, which could not be so well approached on the other side.—That this may be the ordinary course for *Caen* is not improbable, but the practice must, I conceive, have been a little interrupted by the continuance of the blockade of *Havre*. It is scarcely to be supposed that there was not some other station, to which pilots must have resorted, since the mouth of the *Seine* has been interdicted, or that the same difficulty of obtaining a pilot for *Caen* on this side of *Cape Barfleur*, that is said to have prevailed in ordinary times, should still exist.

It

It may be admitted, however, on this point, that the master might be misled by the former practice, and that he might have intended very innocently to take a pilot off *Cape La Heve*. He says that he had passed the *English* frigates with a signal flying, and without opposition, which is not contradicted, and so far, it appears, his conduct had not excited any great suspicion. But the case is materially altered in the sequel, when we learn from his own admission that he had stood in within one mile of the shore, *after* he had perceived a pilot boat to be *coming out* to him. There was then no necessity to go in farther; yet he continued to approach the shore, and after he had been hailed by the captors, and had refused to bring to on the first notice. This view of his conduct does, I think, warrant, and indeed compel the Court to hold, that whatever the equivocal cause of such a situation may be, a person cannot be allowed to approach so near to a blockaded port, as to place himself almost within the effectual protection of the shore, and with no necessity existing. To allow such an approach would render the whole purpose of blockade perfectly nugatory.

It is admitted, that the master had seen the pilot-boat at twelve miles distance early in the morning; that he had hoisted a signal, and perceived the boat to be coming off. What had he to do then but to have waited where he was, and where he had passed the frigates, as he says, without being considered to be in a suspicious situation? Instead of this prudent and natural course of conduct, he continued to approach, and in defiance of the captor's boat, since it appears that he did not bring to until a gun was fired at him. The extreme imprudence of this behaviour, and the great improbability that any person would so act, but from some sinister

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motive, lays him under the avoidable imputation of being engaged in an attempt to break the blockade. It is a possible thing that his intention was innocent; but the Court is under the necessity of acting on the presumption which arises from such a conduct, and of inferring a criminal intention. On a full consideration of all the circumstances of the case, and on the representation of the party himself; I am bound to pronounce that this ship and cargo were failing in breach of the blockade of the *Seine*, and that they are consequently subject to condemnation.

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12th, 1805.

THE HUNTRESS, STINSON, Master.

Salvage—
not given on
recapture of a
cargo of naval
stores going to
Gibraltar and
Malta, on the
account of the
American Go-
vernment, and
for the American
squadron.

THIS was the case of a demand for salvage on an American ship and cargo recaptured from a Spanish cruizer, which had seized the vessel as prize, on a ground that she was bound to *Malta*, with a cargo of provisions and naval stores, on a destination to a belligerent port,

On the part of the Captors, the King's Advocate and Arnold.—The principle of law is now settled, that neutral property recaptured from the enemy, shall pay salvage, when there is reasonable ground to conclude that it would have been subject to condemnation in the Courts of the enemy. With respect to American vessels more especially, the propriety of the rule has been recognized by the law of that country which establishes the payment of salvage for such services; and in the case of the *Betsey* (a) before the

(a) Lords, May 1803.

Lords

Lords of Appeal, an *American* ordinance to that effect (a) was expressly noticed and applied, in fixing the rate of salvage, which was decreed. As to the danger from which this cargo has been saved, it is impossible to doubt, that a cargo of naval stores going to the

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(a) The Court of Appeal in that case decreed a salvage of one-third, with reference to the Act of Congress, 2d of *March* 1799, "which enacted, that the ships or goods of the citizens of the United States, or of the citizens or subjects of any nation in amity with the United States, retaken from the enemy, should pay salvage, according to the following rates, if retaken, within 24 hours, one eighth; within 48 hours, one-fifth; within 96 hours, one third; and above 96 hours, one-half."

The former ordinances, of 25th *June* 1798, and 9th *July* 1798 related only to the property of *American* citizens and subjects, and established a very indefinite rate, leaving it at the discretion of the Court, between the proportions of one-eighth and one-half.

Since the ordinance of 1799, a later ordinance of 3d of *March* 1800, seems to have remodelled the law on this subject, by enacting, with respect to *American* subjects, sect. 1. that vessels or goods, belonging to any persons resident within or under the protection of the United States, and retaken from the enemy, before they have been condemned as prize by any competent authorities, shall pay, in lieu of salvage, if retaken by a public vessel of the State, one-eighth; and if retaken by a private vessel, one sixth; and if such vessel shall appear to have been set forth and armed as a vessel of war, one half. The third section relates to the property of alien friends, and enacts "that the vessels or goods of persons permanently resident within the territory and under the protection of any foreign Government in amity with the United States, and retaken by the vessels of the United States, shall be restored to the owner, he paying for and in lieu of salvage such proportion of the value thereof, as by the law or usage of such Government, within whose territory such former owner shall be resident, shall be required of any vessel or goods of the United States under like circumstances of recapture; and where no such law or usage shall be known, the same salvage shall be allowed as is provided by the first section of this Act. Provided also, that no such vessel shall be so restored to such former owner, in any case when the same shall

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the ports of the enemy of *Spain*, and seized on that very account by a *Spanish* cruiser, would have been liable to confiscation in the Prize Court of *Spain*.

On the part of the Claimant, Laurence and Swabey.—

The principle of salvage is not to be taken so broadly as it is now represented. The general rule has been on great deliberation decided the other way in the case of the *Jonge Lambert*, (5th Adm. Rep.) and the departure from that practice, which prevailed during the later period of the last war, rests solely on the violence of *French* cruisers, and the notorious injustice of the Prize Tribunals of *France*. In the present case the capture was made not by a *French* cruiser, but by a cruiser of a Nation which has always adhered to the principles of the general Prize system, with its accustomed regularity and honour. There is therefore no ground for a suggestion of danger to this property, beyond its just liability to capture by the law of nations. Then what was that? and what were the particular circumstances under which the cargo was going? It was a cargo going on the account of an independent Government, whose acts are entitled to be so far distinguished from the mere mercantile speculations of individuals, that they are to be received and considered with the fullest confidence and good faith on the part of other Governments, and are not on slight grounds to be called in question. What was the professed purpose and destination of these articles? They were not even going

shall have been condemned as prize by competent authority before the recapture, nor in any case, when by the law or usage of the foreign Government the goods or vessels of subjects of the United States in like circumstances would not be restored."

necessarily

necessarily to Malta, but were consigned to that port only on the event of the *American* Squadron being there, with a direction to go on to *Syracuse*, if that should be the place of rendezvous, as indeed it was expressed to be most probable. The reality of this purpose is guaranteed by the certificate of the *French* Minister of commercial relations in *America*. It is impossible to suppose, therefore, that the result of any proceeding instituted as to this vessel in the Prize Court of *Spain* could have been unfavourable to the property, or that it would not have been restored immediately, according to the justice of the case, and with due attention to the certificate of the *French* Minister, which may be considered as a special pass or permission, under the authority of an ally, in the war.

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In Reply, the King's Advocate and Arnold.—Since this case was first opened, a particular paper has been pointed out to the notice of the captors, as having the effect of a special permission or pass from the *French* Minister, and it is contended that this instrument would have removed all danger from the cargo in the Tribunals of *Spain*; But how would this certificate have produced any such effect? To the Tribunals of *Spain*, an independent State, it could not operate with the force of direct authority. It might be doubted even whether the instrument itself had not been obtained by misrepresentation and surprize, and the *Spanish* Government might justly expect, that a certificate which was designed to operate in their Courts, should have been confirmed by the signature of the *Spanish* Minister in *America*. The relations of *Spain* and *America* have stood for some time on terms bordering on hostilities; and it is not to be supposed

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supposed that in the view which a *Spanish* Court of Law would have taken of these articles going to *Gibraltar* in the first instance, in their way to *Malta*, they would have been considered as innocent. On the contrary, from the impression which the captors seem to have entertained of the consequence, it is evident that the result of the seizure was not so certain. The Court will therefore, under all these circumstances, consider it as a case in which salvage ought to be decreed, according to the law of the *American* Government, and according to the proportion fixed in their ordinance.

JUDGMENT.

Sir *William Scott*.—This is a question arising on the recapture of an *American* vessel laden with stores and provisions, and going with a contingent destination to *Malta* or *Syracuse*, when she was taken by a *Spanish* privateer, and retaken by a privateer of this country. It has been truly stated, that neutral property recaptured is not subject to salvage by the general rule of law on this subject, founded upon a supposition that justice would have been done if the vessel had been carried into the port of the enemy; and that if any injury had been sustained by the act of capture, it would have been redressed by the Tribunal of the country, to whose cognizance the case would regularly have been submitted. It is true, likewise, that during the last war the universal system of plunder and violence, which was practised on the part of *France*, drew this Court out of its usual course, and induced it to decree salvage, with the perfect acquiescence of the subjects of neutral States, who were fully sensible of the service

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vice that was rendered to them, by taking them out of *French* hands. But this exception did not alter the established doctrine of the Court: It was a deviation which originated in cases of *French* capture, and I am not aware that it has been applied in recaptures from other States (a).

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This is a recapture from a *Spanish* cruiser. But it is said that the treaty between *Spain* and *America* expressly prohibits the carrying of articles of this description to the ports of an enemy. Certainly, if the cargo was going absolutely to *Malta*, and in a way of being made subservient to the use of the enemy of *Spain*, under the article of the Treaty, it would be subject to seizure and confiscation, and that might lay a ground for salvage on the part of a recaptor. But the fact is not so established—it was not going to *Malta*, consigned to *English* possession, and *English* use; but for the supply of the *American* squadron, which was at that time employed in those seas. It was not even going *decidedly* to *Malta*, but to the station of the *American* Commodore, wherever that might be, who was cruising in those seas, for the purpose of defending the trade of *America* against the *Corsairs* of *Barbary*, who are in some measure to be considered as the common enemy of the commerce of *Spain* and *America*, and all other States.

The property belonged to the *American* Government, which was not engaged in traffic *lucranda causa*, but was exporting the present supply only for the use of its own squadron. I am to consider, then, under what aspect such a

(a) Since decreed (b) in the *Principe de la Paix*, in the case of (b) 11th April, 1808,
some dollars, the property of merchants of *Portugal*, captured on board a *British* packet, and recaptured from a *Spanish* cruiser.

vessel

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vessel would have been viewed in the *Spanish* Court of Prize, in a fair and just light, and not under any violent or capricious feeling, that for the purposes of the present argument, may be imputed, as likely to divert the learned person who presides in that Court, *from the performance of his duty*. There is no ground for such a surmise. This Court will not lightly entertain a suspicion, so injurious to the honour of the *Spanish* Tribunals, or suppose that the known and established principles of justice would not meet with the same candid observance in the Courts of that Country as in those of our own.

There is enough, I think, to convince this Court, and any other Court which I am to suppose would be guided by the same principles of impartiality and justice, that this cargo was not going on a speculation of individuals, who might be catching at opportunities of gain, in violation of the duties imposed upon them by the public Treaties of their Country; but that it was the property of the *American* Government, destined for the supply of the *American* Squadron in those seas. All the evidence in the case speaks the same language: There is the charter-party, with the agent of the *American* government; There is the letter or public dispatch of the officer of marine, containing directions to the *American* agent at *Malta*. There is beyond that, I observe, amongst the original papers, one under the seal and sign-manual of the President of the United States, describing the nature and purpose of this consignment; *That* is, moreover, I will not say *confirmed*, because nothing can go higher than the declaration of the Government itself, but *accompanied* by a certificate from the *British* and *French* Ministers. Now I cannot but assent to what has been observed on this point, that great respect is due to
the

the declaration of the Government of a State ; not to the extent that has sometimes been contended for, that the convoy of a vessel of the State, or public certificates that the goods on board are the property of their subjects, should be at once received as authority to establish that fact, and to supersede all farther enquiry ; because it is very possible that Governments may be imposed upon with regard to facts of that nature, which they can take only on the representation of interested individuals. But when there is an avowment like *this*, relative to their own immediate acts, it would be a breach of comity and respect due to the declarations of an Independent State to doubt the truth of an assertion, which could not have been made but upon a thorough knowledge and conviction of the fact.

It is a thing so highly improbable in itself, that a Government, which has always professed a most guarded neutrality, should be sending out supplies for the use of the *British* fleet, and in violation of an express article of its Treaty with *Spain*, that it could scarcely have raised a surmise of that nature in the deliberate and unbiassed judgment of any Court of Justice. In addition to the monstrous improbability of such a supposition, all the papers solemnly assert a different application. It is, I conceive, utterly impossible that these articles could have been considered in a *Spanish* Prize Court as going for *British* use, or as liable to be converted to the supply of the *British* garrison at *Malta*. What might have been the case, if a cargo of this kind had been going on a speculation of individuals, even for the supply of the *American* Squadron, I will not take upon me to say ? Articles of this description, belonging only to individuals, and ar-

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MUNTERS.

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rived in a belligerent port, might have been subjected to a demand of pre-emption, and therefore might perhaps have warranted a different rule of decision in the judgment of the Court of *Spain*. But as a cargo going on the account of the Government of the United States, and not of individuals, I cannot but think that it would have been protected in specie from any such demand in the port of *Malta*, and that it would have been free from all danger of an unfavourable interpretation in *Spain*. On these considerations I am of opinion that the privateer, which has made the recapture, is not entitled to any thing in the nature of salvage, nor to more than the expences of bringing the question before the Court, as it certainly was a question proper enough to be submitted to judicial determination.

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1805.

THE HOFFNUNG, SCHMIDT, Master.

Blockade of *Cadiz*, if raised—
Renewal not
to be presumed,
—notification,
&c. necessary to
the recommencement of
a blockade of
that species of
war.

THIS was the case of a *Swedish* vessel, which had sailed the 17th of *July* from *Nantes*, with a cargo of corn or flour for the port of *Seville*, which was claimed under His Majesty's Instructions, 1st *Feb.* 1805.

On the part of the Captors, the King's Advocate and Adams.—This vessel appears to have laid for some time under an embargo in the port of *Nantes*, and to have been liberated at last on the condition that she should take a cargo on board for *Seville*, notwithstanding

ing the blockade of *St. Lucar*, which comprehends that port, and which had existed since the notification of the 25th of *April*. On a former (a) occasion a doubt was entertained whether the blockade of *St. Lucar* had been resumed after Sir *John Orde* was driven off. It now appears from a communication with the Admiralty, that immediately after the intelligence was received respecting Sir *John Orde's* squadron, directions were sent to Lord *Collingwood* to proceed to *Cadiz*; and that he had arrived on that station on the 8th of *June*. It cannot be doubted therefore that long before the date of this transaction, it must have been perfectly notorious at *Nantes* that *Cadiz* and *St. Lucar* were in a state of blockade. It appears, indeed, from a correspondence which passed between Lord *Collingwood* and the neutral Consuls at *Cadiz*, on the 23d *July*, that he had been before that port some time, and had given public intimation of his intention to enforce the blockade,

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(a) *Trisheten*.

On the part of the Claimant, Laurence and Robinson.
—It is material to consider the dates of this transaction, for the purpose of judging, how far persons at *Nantes* can be supposed to have made this shipment, in defiance of any knowledge of the blockade of *Cadiz* and *St. Lucar*. The cargo was put on board in the month of *June*, and the ship sailed about the 11th *July*, nearly ten days before the date of that letter of Lord *Collingwood* to the Consuls of *Cadiz*, which seems to refer to their letter of the 19th, as the first communication that had passed on the subject. The ship was captured at a considerable distance from the coast of *Spain*, and long before she could have contravened

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contravened any recent rights, that might arise out of a blockade *de facto*, accompanied with due notice and warning. In a former case of the *Tribeten* nearly the same circumstances occurred, and on that occasion the Court intimated an opinion, that if it was meant to affect neutral vessels with an observance of the blockade of *Cadiz*, under the Notification of the 25th *April*, it should be shewn that that Notification had been renewed, and republished, after the interruption which it had received from the appearance of the combined fleets. No fact of that kind is now alledged; but it is attempted to supply the place of that public notice by the notoriety which, it is said, must have prevailed in the ports of *France*, from the appearance of Lord *Collingwood's* squadron off those ports. As far as we can collect from that correspondence, the operation of his squadron on that station must have been subsequent to the date of this transaction. No facts have been shewn to induce the Court to recede from the decision, which it made in the former cases, in which the ships and cargoes were restored.

In Reply, the King's Advocate and Adams.—The claim for the cargo in this case is given under the instructions of the 1st *February*, which contain an exception of *blockaded ports*. It will be immaterial, therefore, whether the Notification of the 25th *April* shall be held to be in force or not, since it will be sufficient to support the condition expressed in these instructions, if the port shall be shewn to have been under a state of *blockade de facto* only, not accom-

accompanied by any Notification. If it is considered that Lord *Collingwood* had been dispatched to this station two or three months before the date of the present transaction, it will appear highly improbable that the actual renewal of the blockade of *Cadiz* should not have been known at *Nantes* at the time of shipment, or before the sailing of this vessel. If a doubt only prevailed upon the subject, as it was a shipment made altogether under special indulgence, means ought to have been taken to ascertain the truth of the report. That a doubt did exist, is evident from a paper found on board, purporting to be a certificate from the *Prussian* Consul at *Nantes*, "that he had received no communication from his own country as to the blockade." On this point, however, it is possible that some distinction may be admitted between the case of the ship and cargo, because as the cargo was shipped under the order of the *Spanish* Government, that Government must have been apprized of the renewal of the blockade, long before the intelligence could reach neutral nations. It was to be expected that immediate orders should have been given to the *Spanish* agents at *Nantes* not to persevere in the execution of a shipment, which could no longer be completed, without violating the reservation, expressly announced in the instructions of the 1st *February*.

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JUDGMENT.

Sir *William Scott*.—There had been a very humane order issued by the *British* Government, in consideration of the distress to which the Kingdom of *Spain* was reduced by famine, to permit cargoes of corn to be carried to that country, without exception as to

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the property, but with a *reservation* "that it should not be carried to blockaded ports." This was unquestionably a very beneficent and liberal relaxation of the rights of war, since an enemy has a right to avail himself of the exigency produced by famine, as well as by any other distress. There can be no doubt that this relaxation was received by *Spain* with suitable impressions; and it was incumbent on the Government of that Country to take care that their orders were properly carried into effect, and that they should not be abused to cover fraudulent attempts to violate a blockade that was imposed on any of the ports of *Spain*.

It appears that the port of *Cadiz* and *St. Lucar* were put under blockade by a Notification of the 25th of *April*; but it unfortunately happened that the Notification issued at a time, when it became equally notorious that no blockade actually existed, since the *British* Squadron had been recently driven off by a superior force. In a former case, a question was raised, whether the Notification which had issued, was not still operative, at least for the purpose of sustaining the effect of these instructions. But the Court was of opinion that it could not be so considered, and that a neutral power was not obliged, under such circumstances, to presume the continuance of a blockade, nor to act upon a supposition that the blockade would be resumed by any other competent force.

It was argued on that occasion that neutrals were bound to act upon such presumptions, and on the same principle, on which it has been held, that when a blockading Squadron is driven off by adverse winds, *they are bound to presume that it will return, and that there is no discontinuance*

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discontinuance of the blockade. But certainly the two cases are very different. When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of *system*, since it could not be expected that any blockade would continue many months, without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, and which introduces therefore a very different train of presumptions, in favour of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed; and therefore if it is to be renewed, it must proceed *de novo*, by the usual course, and without reference to the former state of facts, which has been so effectually interrupted. On this principle it was that the Court held the former blockade to have become extinct, and intimated an opinion that there should be a repetition of the same measures, on its recommencement, to bring it to the knowledge of neutral States, either by public declaration, or by the notoriety of the fact.

It is not now contended that any new *declaration* has issued, and the Court has already determined that the former notification had become extinct. It remains, therefore, to be considered, whether there has been that *notoriety* of the *fact*, from the operation of time or from other circumstances, which must be taken to have brought the existence of the blockade to the knowledge of the parties.

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Among other modes of ascertaining that fact, a prevailing consideration undoubtedly is the length of time, in proportion to the distance of the country from which the vessel sails. What I have to lament in this instance is, that we labour under an ignorance of the true *terminus a quo*, not having the necessary information as to the time when Admiral *Collingwood* returned to that station. Although something is to be collected from the letters, to which a reference has been made, they do not, I think, supply sufficient information, or with such precision as can enable me to found a judicial sentence upon it.

With regard to the ship, I am bound to advert to the situation of hardship in which *Swedish* vessels were placed by the embargo, which was imposed upon them in the ports of *France*. It was a material object with the *French* Government, to have the ports of *Spain* supplied with articles of provision. To effect this purpose, it was not unlikely that means of imposition and force would be employed, more especially against *Swedish* vessels, who were in a particular manner *inopes concilii*, owing to the cessation of all diplomatic correspondence between their own Government and *France*. They had been put under an embargo, and were released, it appears, for the purpose of being made the instruments of conveying these supplies to the ports of *Spain*. It is natural to suppose, that any information that might have reached the Government of *France*, as to the actual state of the ports of *Spain*, would be withheld from them. Unless it is shewn, therefore, in the clearest manner, that the knowledge of the actual blockade of *Cadiz* and *Saint Lucar*, which is said to have existed, had reached the masters of these vessels,

vessels, I shall think myself bound to act towards them with great indulgence, and with due consideration of the difficulties under which they were placed.

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Their case is very different from that of the proprietors of the cargo. For who are they? The *Spanish* Government—Who were bound to observe the most perfect candour and good faith. They could not but know the fact, if *Cadiz* was actually blockaded. It was their duty to have transmitted the earliest information to their agents in *France*, and to have altered the destination of their cargoes to other ports, to which they might go without infringing the instructions, which had issued in their favour. There is, therefore, a material distinction between the ship and the cargo. Unless it is proved in the most unequivocal manner, that the master was affected with a knowledge of the alledged blockade, I shall hold the vessel to be exonerated. With respect to the cargo, if it is shewn that the blockade did exist, and, that there had been time for communication from *Spain*, those interests will not be entitled to the same indulgence. I shall, therefore, at present, make no other order, but to require the recommencement of the blockade to be distinctly ascertained, meaning to apply the inferences that may arise from the interval of time, very differently to the case of the ship, and of the cargo.

On a subsequent day (a) this case came before the Court again on the information required to be produced of the time when Lord *Collingwood* resumed the blockade of *Cadiz*. No farther information was exhibited, but only the certificate of the Admiralty, stating “that Lord *Colling-*

(a) 24th July,
1806.

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wood arrived off *Cadix* on the 8th of *June*." The cause was argued on the *sufficiency of that Act*, and the inferences deducible from it, whether they were such as could be held to *re-establish* the blockade, so as to impose on the Government of *Spain* an obligation of counteracting this shipment, previous to the sailing of the vessel.

JUDGMENT.

Sir *W. Scott*.—What the Court has already decided, on the best consideration, is, that the raising of the former blockade by a superior force, was a total defeazance of that blockade and its operations. Whether that is a sound opinion or not, must be left to the determination of the Superior Court: My persuasion is, that there could not be a more effectual raising of the blockade; and that it should be renewed again by notification, before foreign nations could be affected with an obligation of observing it as a blockade of that species still existing. Under this view I have already intimated my opinion that the mere appearance of another Squadron would not restore it, but that the same measures would be necessary for the re-commencement, that had been required for the original imposition of the blockade, and that foreign merchants were not bound to act on any presumption that it would be *de facto* resumed.

It became therefore, very desirable that some account should be given of the manner in which the blockade was re-commenced. Enquiries were directed to be made at the Admiralty, which have produced no other answer than this, "that Lord *Collingwood* had arrived off *Cadiz* on the 8th of *June*;" and a letter is produced from Lord *Collingwood* to the Foreign Consuls at *Cadiz*, of the 23d of *July*, of which the Court was
already

already in possession. This appears to me to be very unsatisfactory, since Lord *Collingwood* might arrive off *Cadiz* with very different intentions. He might go there with a fleet of observation merely, or for purposes of a qualified blockade.

The Court expressed a wish to be informed, whether any orders had been sent to Lord *Collingwood* respecting the renewal of the blockade, and whether it had been notified to the *Spanish* Government. In answer to these enquiries no farther information is obtained than what relates to the arrival of Lord *Collingwood*, and the letter of the 23d of *July*. It is manifest, I think, that Lord *Collingwood* did connect the two blockades together, and that the same apprehension has been entertained since. But I am of opinion, as far as my opinion can have any weight, that this interpretation cannot be supported, but that it would be necessary that the same form of communication should be observed *de novo*, that is required to establish an original blockade.

The question now is, whether, independent of any notification, the fact of Lord *Collingwood*'s arrival, and his subsequent conduct were such as would impress on foreign nations the obligation of knowing that there was a blockade *de facto*; and more particularly whether the *Spanish* Government ought to have taken notice of it, so as to have communicated the intelligence to the shippers in *France*, and to have prevented the sailing of this cargo. On the former hearing, I was of opinion that the *Swedish* vessel was clearly excused, although the *Spanish* Government might possibly be affected with the obligation of communicating advice to their agents. In the case of the *Falck*, it appeared that the violence of the *French* Government

had

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had actually forced that vessel out of port, and in defiance of the knowledge of the blockade, which the master admitted himself to have received, but at a later period than the date of this transaction. I am now to consider whether any evidence is produced that can fix upon the *Spanish* Government a knowledge of the blockade, that should have prevented the sailing of this vessel, and that should affect them legally with the consequences of culpable negligence. I am of opinion, that there is not. It appears from the letters of the 23d and 25th *July*, that the question was, at that time, dubious at *Cadiz*, and that some vessels had been suffered to pass. That the *Spanish* Government at *Madrid* should be impressed with a distinct knowledge of the fact, that was rendered doubtful at *Cadiz* on the 23d of *July*, so as to have prevented the sailing of this vessel from *Bordeaux* on the 13th of *July*, is, I think, out of all physical possibility. I must, therefore, make the same decree in this case as in other cases under the instructions.—Restored on payment of the captor's expences.

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1805.

THE VIGILANTIA, REYNAERT, Master.

Vessel sold in a blockaded port, by a neutral, who had himself purchased of the enemy since the commencement of hostilities.—Further proof necessary—refused.

THIS was a case of a ship, originally *French*, that had come out of the port of *Havre*, in ballast, during the blockade, *July* 1805, and was claimed on the part of Mr. *Dammers* of *Emden*, under a transfer asserted to have been made to him from another neutral merchant during the blockade of that port.

It was alledged that the vessel had been acquired by purchase from the original *French* owner in
July,

July, 1803, before the commencement of the blockade; and it appeared that she had continued in that port until the time of sailing on the present voyage.

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On the part of the Claimant, Laurence—contended that a ship coming out in ballast was not guilty of a breach of blockade, on account of any transfer that might have taken place between neutral persons in that port. As to the former sale by which the vessel passed from the *French* owner to the seller, that transaction was altogether prior to the blockade, and could therefore not be made subject to any *rules* or principles of law arising out of that system. That if any doubt was entertained as to the fact of property, it could only be directed to be cleared up in the ordinary way of proof as to the original transfer.

On the part of the Captor, the King's Advocate.—The former asserted transfer from the enemy proprietor took place in *July 1803*, yet the vessel continued to lie in *Havre* for two years, till *July* in the present year. This circumstance alone is sufficient to raise a strong suspicion that the former sale was not for the purpose of giving to the pretended purchaser the use and property of the vessel, but as a mode of cover, and for the purpose of removing the substance of the transaction more effectually from the view of the Court. It is by such a contrivance rendered impossible for the Court to obtain satisfactory evidence of the actual transfer from the enemy. It cannot be denied that such a transfer must be a subject of farther proof. By this shifting of character the
Court

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Court is entirely precluded from calling on the original purchaser to support his title, and that artifice is no doubt intended to cover the defect of proof, which necessarily exists in such a case. If a neutral vessel which had entered the port of an enemy before the commencement of a blockade, is allowed to be transferred *whilst lying there* to a neutral purchaser within a reasonable period of time, it will not follow that the same permission should continue during the whole blockade, or for the considerable space of time during which this ship appears to have laid in the blockaded port.

JUDGMENT.

Sir *William Scott*.—There are two facts in this case which attract attention: First, that the vessel was clearly the property of the enemy at the commencement of the war; and secondly, that she was taken coming out of a blockaded port, from which she could not legally sail, if she had been transferred from the enemy during the existence of the blockade. These two facts make it necessary to be proved to the satisfaction of the Court, that there had been such a transfer made to the person now claiming the property, as entitled him to bring the vessel out of the blockaded port; though it is not easy to devise any mode of application, by which the Court can arrive at satisfactory proof of the original transfer, if that is not sufficiently established by the original evidence. The first purchaser cannot be called upon, and I see no sources of additional evidence to which the Court can have recourse. I will not say that a ship originally neutral, upon which no suspicion of enemy's property could arise, might not be transferred by one neutral

to another in a blockaded port. That point has been already favourably determined. (a) But when an enquiry is necessary as to the property, for the very purpose of deciding upon the operation of the blockade, and when no satisfactory proof can be obtained, I am of opinion that the Court is warranted to reject the claim in the first instance. Without some such rule, it would be impossible that the blockade could be maintained.

Condemned.

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VIGILANTIA.

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1805.

THE RANGER, SMITH, Master.

Sept. 13th,
1805.

THIS was the case of an *American* ship with a cargo of biscuit and flour that had been put on board from the public stores at *Bordeaux*, and was going to *Cadiz*, though ostensibly documented for *Ville Real*, in *Portugal*. A claim was given for the cargo under the instruction of the 1st of *February*.

Contraband,
ship biscuit
from *Bordeaux*
to *Cadiz*, con-
demned.

On the part of the Captor, the King's Advocate contended—That ship biscuit going to *Cadiz*, under false papers, would, independent of the question of blockade, be liable to confiscation as contraband, being evidently intended for the supply of the *Spanish* fleet, or for the purpose of victualling the *French* ships in that port. That as to the fact, the master admitted that he was destined to *Ville Real*, only on the contingency of *Cadiz* being under blockade; that he was steering for *Cadiz*, and that his real bills of lading, which disclosed the true state of the transaction, were sent over land to *Cadiz*.

(a) *The Pasdani*, 4 Adm. Reports, page 89.

JUDGMENT.

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JUDGMENT.

Sir William Scott.—This is a very gross attempt to abuse the instructions which were issued for the supply of provisions to *Spain*. It must always be remembered that this Government might have availed itself of the interior distress of the enemy's country as an instrument of war; It did not, however; but humanely permitted cargoes of grain to be carried, without molestation, for the relief of the necessities of famine under which *Spain* had for some time laboured.

It was natural to expect that a grant made with so much liberality, would have been used with the most delicate honour and good faith, both by *Spain* and her allies. But what is the use which is now made of it. A large quantity of biscuit, destined evidently for sea stores, is put on board, as it is impossible to disembark, from the public Storehouse at *Bordeaux*, and sent to the port of *Cadiz*. The master admits, that it was to have been delivered at *Cadiz*; but he will not tell you who was the lader, nor any thing more of its destination, than "that it came from the public stores at *Bordeaux*."

I cannot but consider this attempt as a gross abuse of the instructions, which will justly render the cargo subject to condemnation, and I think I am called upon to stigmatize this transaction as an act of ill faith, by condemning the claimant in the expences of the claim. I also condemn the vessel, as employed in carrying a cargo of sea stores to a place of naval equipment under false papers. It is described, I perceive, as an *American* vessel. But if the owner will place his property under the absolute management and controul of persons, who are capable of lending it in this manner to be made an instrument of fraud

in

in the hands of the enemy, he must sustain the consequence of such misconduct on the part of his agent.

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THE FRANKLIN, DANA, Master.

Sept. 13th,
1805.

THIS was the case of a ship claimed as the property of Mr. *Ingals*, an *American* merchant, and of a cargo of tobacco shipped in *America* for *France*, as the property of *I. and W. Bell*, partners in a house of trade in *America*, and also of a house in *London*, where Mr. *W. Bell* resided, but claimed as the sole property of *I. Bell*, of *America*.

Trade with the enemy, on the part of Mr. *Bell* of *London*, jointly interested with his brother in *America*, in a shipment from *America* to *France*,—his share condemned.

On the part of the Captors, the King's Advocate and Laurence argued against the proofs of property of the ship—and with respect to the cargo contended, that as it was put on board, and described in the regular papers as the property of *I. and W. Bell*, Mr. *W. Bell* could not now be permitted to renounce his share, and assign the whole to the person in *America*; that his share would be subject to condemnation as property engaged in trade with the enemy. That this had been decided in a strong case before the Lords, in which it appeared that three brothers of the name of *Simpson* were engaged in partnership as members of a house of trade in *America*, where the managing partner resided, whilst the other brothers resided in this kingdom—one in *Scotland*, the other in *London*; that although it appeared that the goods had been consigned to the enemy solely by the direction of the managing partner in *America*, the Lords held that the property belonging to the partners in this country, in a transaction as to them illegal, though without their immediate privity or direction, could not be restored, and condemned two-thirds of the cargo, restoring only that proportion that appeared

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to belong to the partner in *America*. In the present case the facts were stronger against the claim of Mr. *W. Bell*, since it appeared that he was the managing person in *Europe*, and that the goods were going to *France* by his orders and direction; that it was a case, therefore, in which he could not receive restitution of the share appearing by the ship's papers to belong to him.

On the part of the Claimants, *Arnold* argued on the effects of the evidence, and contended that it was at most a case in which the claimants would be required to give further proof.

With respect to some specified parts of the cargo, it was suggested that they belonged to different planters in *America*, whose names were set forth, and who, it was said, having little communication as merchants with *Europe*, had used the name of Mr. *Bell*, as meaning to avail themselves of his assistance and connexions in *France*, to dispose of their shipments of tobacco, being the produce of their own plantations.— It was prayed that the claim might be allowed to be amended, so as to admit proof on their behalf.

JUDGMENT.

Sir *William Scott*.—The ship is claimed as the property of Mr. *Ingals*, a citizen of *America*, and is so described in the certificate, or sea letter, which states the vessel to have recently become his property, and to have been a foreign ship, as indeed the nature of that instrument in some measure implies. Five witnesses have been examined, who have given but a very unsatisfactory account. The first witness says, “that he knows no farther than that he had heard that the ship

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ship belonged to *Bourdeaux* in *France*," though it does not appear from what quarter he received this information, nor indeed whether he meant to represent her as *now* belonging to *France*. Another witness "knows not to depose." The third witness, says to the ninth interrogatory, "that he knows not, but had heard from a man who had sailed in her, that she belonged to Messrs. *Hofkins* and *Gray*, No. 4, *Queen-street*, *Bourdeaux*; that when he was first shipped there was a *French* boatswain on board, who said he should join her again at *Bourdeaux*." It is rather a singular coincidence that this description, which is very precise, of the persons in *Bourdeaux*, to whom the property is said to belong, should correspond exactly with a material fact in the case, that the vessel was actually consigned to that house on the present voyage, and by an instrument, which this witness could not have seen. At the same time it is a fact not absolutely inconsistent with a supposition, that the ship had been formerly their property, and had been transferred by them. It does not necessarily give to this deposition the effect of proving, that the vessel belongs to these persons at the present time. The mate, it is to be observed, knows nothing of the property, though it is rather an extraordinary circumstance, that he should not be able to depose to any degree of belief upon that point. The master positively deposes that the vessel belongs to Mr. *Ingals*, but he is the only witness who gives any support to the papers.

It is said that some of the witnesses were likely to depose, as they have done, from motives of revenge and malice; and it appears from the evidence, that the crew had been taken before a magistrate, on account of a dissa-

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tisfaction which they had expressed at the change of the voyage, and that they had threatened to sell the ship to the first *British* cruizer, by declaring her to be *French* property. Certainly this behaviour on their part cannot but produce a deduction of credit, though it does not absolutely prove that they have deposed falsely. A person in the possession of a dangerous secret may gratify his revenge by a disclosure of the truth. It is by no means impossible that their depositions may not be false, though they are subject to a very great drawback of credit on the account of these motives, and must be received with great caution and jealousy.

Connected with these depositions, it cannot but be considered as a suspicious circumstance, that the master should profess an entire ignorance of the former history of the vessel, though there is enough to satisfy me that she had been a *French* ship. That the master should be the only person who was not in the secret, is rather extraordinary. If it was known to him, he has given a dishonest representation. If it was not known to him, his owners have behaved disingenuously, since they were bound to have furnished him with the knowledge of so material a fact, which was likely to become a subject of enquiry. If they put a man into the situation of master of a vessel in this blindfold manner, without giving him an account of her previous history, it cannot but have the appearance of a studied suppression, and they must not be surprized if some inconvenience ensues. It was their duty to have told him that she had been a *French* vessel, and to have put the documents of purchase on board. Under these defects it is impossible to say that there is sufficient

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cient proof of property. At the same time I am unwilling to conclude the case on the evidence of persons whose testimony is liable to be so impeached. I shall, therefore, order further proof, but the proof that is produced must be very satisfactory, because if it should turn out that the vessel had been the property of these *French* merchants, it must be very cogent proof that will convince me that their interest has been divested. There must, therefore, be an order for further proof as to the ship (a).

Then as to the cargo—That has been claimed for Mr. *I. Bell* of *America* who is a partner in a house of trade in *America*, and also in a house in this town under the firm of *John* and *William Bell* of *London*. Some of the formal papers hold out the name of *I. Bell* only; but other documents, as the charter-party and the instructions, mention the interest of *I. and W. Bell*; and there are papers which point to directions which were to be received from Mr. *W. Bell*, when the property came to *Europe*. It has been decided by an authority to which this Court must bow, that even an inactive or sleeping partner (as it is termed) cannot receive restitution in a transaction, in which he could not lawfully be engaged as a sole trader. I can have no doubt, therefore, that any share belonging to Mr. *W. Bell*, who is by no means an inactive partner, but appears rather to have been the person principally concerned in the management, if not in the interests of this transaction, will be subject to condemnation. The master says to the 12th interrogatory, “that the cargo belongs jointly to *I. and W. Bell*, and that *I. Bell* told him so,” though in another place he says; “that it is the sole property of the lader.” It is a case, therefore, in which the papers are inconsistent, and the master’s account is inconsistent even

(a) On the 12th Feb. 1806, the ship was restored on farther proof.
K 2 with

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with itself. The fact of property is left in such obscurity, as to create a necessity for further proof. They have the parties so conducted themselves as to forfeit this privilege? I do not think that they have. The master is charged with a suppression of papers, which is denied. It will be proper that he should give an explanation of his conduct, in this respect, so as to exonerate those by whom he is employed. There must be also further proof to negative the interest of *Mr. W. Bell*. As that Gentleman is in *London*, his testimony on that point might perhaps be most material; but the nature of the proof, which shall be exhibited, will more properly be left to the discretion of his legal advisers. Further proof ordered of ship and cargo.

11th of February,
1806.

On a subsequent day, the cause came on again to be heard upon the production of *Mr. Bell's* further proof, and upon the claims of the merchants in *America*, who had used the name of *Mr. Bell*, in exporting sundry parcels of tobacco to *France*. The Court was of opinion, that the letter of *Mr. W. Bell*, in which he had given notice that he could not be concerned during the war in any cargo sent to *France*, was not sufficiently corroborated by proof of the receipt of that letter, or of the manner in which it had been acted upon; and gave him an opportunity of producing still further proof. That being now exhibited—

(28th Feb.) JUDGMENT.

Sir William Scott.—This is a claim for a quantity of tobacco shipped at *Peterberg*, in *Virginia*, for *Bourdeaux*, by several planters exporting the produce of their own plantations, but documented in the formal papers as the property of *Mr. I. Bell*. A reason, however, is given for the misrepresentation, which is perfectly innocent, viz. "that intending to make

make use of Mr. *Bell's* correspondent in *France* as their consignee, they had shipped it in his name."

There was no design to impose on *British* cruizers, nor has any such effect been produced, since it was a trade free from exception, whether going on their account, or on account of Mr. *Bell*. It is now sufficiently shewn from certificates of property, and the correspondence of the parties, that they are really the owners of the quantity claimed on their behalf; and though the proof is not of the most formal kind, I should think it an act of great oppression, if, after being satisfied of the fact, I was to send these claims across the *Atlantic*, with all the delay that must inevitably ensue, to have the proof exhibited in a more formal manner from themselves. I shall therefore direct their property to be restored.

The principal question then remains, respecting the moiety of seventy hogheads of tobacco, which are claimed in the name of Mr. *I. Bell*. They are described in the general bill of lading, "as for the account and risk of *I. Bell*," who was the general shipper of the whole cargo. But there was a particular bill of lading, also, for this parcel with the marks of *I. and W. Bell*; so that it is not correctly true, that nothing arises on the face of the papers to attribute any share of the property to Mr. *W. Bell*. In addition to this suggestion arising out of the papers, the master says to the 12th interrogatory, "that it is the property of *I. and W. Bell*, and that *I. Bell* told him so." This is a direct declaration, and of no mean authority; though not absolutely conclusive, it affords ground of presumption unquestionably, more especially, as the master is a cautious and discreet man, as far as I can collect, and is not very likely to have spoken lightly or loosely to the prejudice of his employers.

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In a subsequent part of his depositions, he says, indeed, "that the property belongs to the lader," but that must be taken, *referendo* to what he had before deposed, and as not excluding the joint interest of the brother in the transaction. When he comes to give in his claim, however, and perhaps after some instructions received here, he claims this parcel of tobacco as the sole property of Mr. *I. Bell*.

It might have been natural to expect, that if it had been the sole property of that gentleman in *America*, he would have informed the master with particular precision, that it belonged to him exclusively, and that *W. Bell* was to have no interest in it, and that he must understand it to be on his own separate account. It is clear, from the manner in which the master speaks to the 12th interrogatory, that no such communication could have passed. If in time of war, which necessarily requires particular precision, persons conduct their business in such a manner, as furnishes no means of discrimination, they must not be surprised if the Court is unable to protect them from the inconvenience, that must ensue from such a state of obscurity and doubt. There is no invoice; but the manifest describes *I Bell* "as of the house of *I. and W. Bell*," which could not have been done with propriety, if he had been acting only with relation to his own separate interest. It is impossible under these appearances not to say, that farther proof was necessary to discharge Mr. *W. Bell* of an interest in this shipment. Mr. *W. Bell* is a person who had come from *America* to settle here: but in so doing, he can enjoy no greater privileges than other *British* merchants, who are prohibited in time of war from being concerned in any manner of commerce carried on with
the

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the enemy. It is admitted that *I. and W. Bell* are general partners, and that there has been no dissolution of the partnership; but that it does still, as it may legally, exist with regard to exportations to neutral countries. It is averred, however, that there has been a separation as to all shipments to *France*, and that *W. Bell* had written to his brother at the commencement of the war, renouncing all concern in the trade to *France*. Mr. *W. Bell* has made an affidavit of this fact, in which he states also, "that he has not been interested directly or indirectly in any such shipments; that he has not considered himself as interested, nor has he been so considered by his brother *to the best of his knowledge and belief*," not *absolutely*, but only in this qualified manner, *to the best of his knowledge and belief*; and it may perhaps appear rather extraordinary, that he should not be enabled to speak to such a circumstance in a more positive manner, and without limitation. A letter of the 6th of *September* has been produced, in which Mr. *W. Bell* renounces all interest in the shipments to *France*.

It is admitted that this mode of separation would not be sufficient to discharge an interest in a ship; and with respect to the cargo, it is impossible not to feel, that as it was a letter which was to draw the line of demarcation between the joint and separate concerns of two partners, we might expect that it would have received a particular answer. Mr. *W. Bell* presses the subject with particular earnestness on his attention, "let nothing induce you to neglect this advice, for I will have nothing to do with any commerce to *France* till the war is over." It was an occurrence, that would be likely to introduce no inconsiderable alteration in the manner in which the business of the house had been carried on; and it is quite impossible that it

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should not have required particular notice. The letter that was first produced as the answer, is of the 10th of *November*, in which Mr. *I. Bell* writes, "yours and — letters from the 24th of *August* to the 6th of *September* are before me"—but there is not a syllable relative to this separation. It does not indeed necessarily appear that the letter of the 6th of *September* was Mr. *W. Bell's*, or that it might not be a letter from the other Gentleman who is included in the same paragraph. However that might be, there is no mention of any inconvenience that might be occasioned to the ordinary course of their business, nor of any remedy to be provided, to obviate the difficulties produced by this separation.

The difficulty that might be likely to occur, is obvious from this circumstance, that the vessels were to come in the first instance to *Falmouth*, and there to take their ulterior destination to *France*, or elsewhere, under the direction of Mr. *W. Bell*, according to the state of the markets in *Europe*. In *America*, then, it could not be known whether any particular shipment would be a separate or joint account, or to whom the cargo would belong, because it remained uncertain whether the vessel would proceed to *France* or not. It might be supposed that some expedient would have been necessary to obviate this inconvenience; yet no mention whatever is made of that necessary part of this subject.

When the cause came on before, the Court was anxious to give Mr. *Bell* farther opportunity of elucidating these difficulties, which had not been satisfactorily removed. An additional affidavit has now been brought in, which states "the letter of the 10th *November* not to have been the immediate answer to Mr. *Bell's* renunciation of the partnership, and that there

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there must have been some other letter, which either did not arrive, or which has been destroyed, as containing matters of private concern, as their letters frequently did, and were on that account not preserved in the counting-house." Taking it either way, if the letter did not arrive, can I suppose that there would not have been some other reference to the same subject, and that Mr. *W. Bell* would not have urged his former observations, till there was a precise and distinct understanding between them. *If it did arrive, is it a reason why the letter should be destroyed, because it contained some things that were not proper to be generally known in his counting-house?* There are other modes very familiar in practice of preserving a correspondence of a particular nature; and it is not easy to conceive that such a letter would be destroyed on that account. The affidavit states, "that there has been no settlement of accounts between them, owing to the extensiveness of their engagements, and that Mr. *W. B.* has not considered himself, nor is he considered by his brother in *America*, to be interested in any shipments to *France*" That must be taken, I conceive, with reference to the manner in which it was before stated, "*to the best of his knowledge and belief.*" This interest might still be a matter to be brought forward in account, at the end of the war; a supposition which may not unfairly be entertained, and which does, I think, in an extraordinary manner, harmonize with the loose manner in which the separation was first notified and received. There is one other letter produced from Mr. *J. Bell*, which was written after the capture, and in which he refers to this transaction in very general terms—"It was well known to me, and I supposed you equally informed, having regularly replied to your letter of the 6th September, that I considered you

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you are not concerned in shipments to *France*. He does not say that he *had acted upon it*. It is not even confirmed by affidavit, and it is altogether a very loose and general letter on a subject of so much importance. All that remains is the affidavit of the clerk of Mr. *W. Bell*, who says, "that Mr. *W. Bell* has not charged the profits of such consignments to himself, but only the commission of agency, &c." This also is not inconsistent with the supposition, that the real accounts, in which Mr. *W. Bell's* interest may stand prominent, are kept in *America*.

Having given Mr. *W. Bell* farther opportunity of proving in a satisfactory manner the dissolution of partnership, which is suggested to have taken place, under a hope that he would have been able to effect this, I feel myself compelled to pronounce, that he has failed to produce that conviction in my mind; consequently a moiety of these goods must be condemned, as the property of a *British* merchant engaged in commerce with the enemy.

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1805.

THE SCHOONE SOPHIE, ARIANS, Master.

Condemnation
in Consular
Courts—Defec-
tive title of the
neutral pur-
chaser cured,
by an interven-
ing peace.

THIS was a question, as to the ship, reserved at the former hearing, on a claim given by the *British* proprietor, who stated her to have belonged to him, and to have been captured by the *French*, and carried into a port in *Norway*, and condemned by the *French* Consular Court in that country 1799. It now appeared that other proceedings had been afterwards had, on the former evidence, in the regular Court of Prize in *Paris* (a), where a sentence of

(a) On the effect of the Sentences of the Prize Tribunals of *France*, pronounced on vessels carried into neutral ports, the Editor takes this opportunity of inserting the recent (a) Decision of the Court of Appeal in the case of the *Henric* and *Maria, Baar*.

(a) 1st Aug.
1807.

From

of condemnation had been pronounced, *professing* to affirm the sentence of the Consular Court.

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From the decision of (b) the High Court of Admiralty in that case, upholding such a title under the circumstances and considerations there noticed, an appeal was prosecuted, and two other questions of the same kind were brought from Vice Admiralty Courts, in the cases of the *Gluckie Peter*, and the *Jonge Jan*.

(b) *Supra*,
vol. iv. p. 43.

On the 7th August, 1807, the Judgment of the Court of Appeal was delivered by the Master of the Rolls, to the following effect:

Sir William
Grant.

"This case involves a question as to the validity of sentences of condemnation pronounced in a belligerent country on prizes carried into neutral ports. There was some difference of opinion among the members of the Board, before whom the case was originally argued.—But it appeared to me that the acknowledged practice of this Country must have the effect of making those sentences valid, whilst that practice continued. For there could be no equity, on which we could deny the validity of that title to neutrals purchasing of the enemy, at the same time that they were invited to take them from ourselves."

The question is not altogether new.—In the year 1761 a case occurred in which a *British* ship, captured by the *French* and carried to *Christianfania*, and condemned in the Courts in *France*, was sold to a merchant of *Denmark*, who sent the vessel in the course of her trade to a port in *Scotland*. The original proprietors arrested the vessel by precept from the Court of Admiralty, on the ground of the invalidity of such a sentence to change the property. And the Judge of the Court of Admiralty sustained the objection, and decreed the vessel to belong to the original owners. An appeal was prosecuted to the Court of Sessions (c); and under the authority of that Court an inquiry was directed to be made into the practice of the High Court of Admiralty of *England*, on this subject.

(c) *Benton v. Brink*. July 23, 1761, Dict. of Decis. v. iii. p. 328; also Decis. Reported, from 1760 to 1764, v. i. p. 104.

It was on that occasion certified to be the practice of the High Court of Admiralty to condemn vessels lying in neutral ports; and on that information the Court of Sessions reversed the judgment of the Court below, and decreed restitution to the *Danish* purchasers; and in that sentence the *British* owners acquiesced.

After this declaration of the practice of our own Courts, it would be a very great hardship on *Danish* merchants, to expect that they should know

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SOPHIE.

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On the part of the British Owner, Arnold contended—That the sentence of the Tribunal in *France* could not avail to remedy the defect imputable to the original sentence; that the Court at *Paris* did not appear to be a Court of Appeal, and could not found a sentence on the process which had issued from another Court. That it did not appear that any monition, or original process had preceded the sentence of the Court at *Paris*; that in professing to *affirm* the sentence of the Consular Court, it did no more than affirm it as it then stood, in its defective state; that the nullity before imputable to the original sentence still continued, and the *British* proprietor would therefore be entitled to the restitution of his property on salvage.

On the part of the neutral Claimant, Laurence and Robinson contended—That it did not appear that the Court of Prize at *Paris* was limited in its constitution

(a) Vide *supra*,
vol. 2. p. 119.

know the law better than the Courts of *Scotland*, or to require that they should abstain from purchases of this kind, on a mere surmise that a different doctrine might be held forty years after. The equitable mode of correcting the principle of law, if it is wrong, would be to correct, in the first instance, the practice of our own Courts. If that is altered (a) so as to be brought to the knowledge of neutral merchants, the question as to them will be materially changed. They will no longer be at liberty to stand on our practice, and say, the title is allowed to be good amongst yourselves. They must come forward, and support their pretensions on other grounds; and then many of the considerations that were urged in argument at the hearing of this case will be deserving of very serious attention. It is not necessary to enter upon those topics now, because this Court is of opinion that neutrals are sufficiently confirmed in their title, by the practice which has prevailed amongst ourselves. On these grounds the sentence of the High Court of Admiralty in the *Henric and Maria*, must be affirmed, and the sentences of the Vice Admiralty Courts in the two other cases, restoring such property to the former owners, must be reversed.

from

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from proceeding on examinations taken in other Courts, in the same manner, as it had been anciently the practice of the *French Prize Courts* to proceed on depositions taken by Consuls in foreign ports; that as to the want of an original monition, to found the process of the Court at *Paris*, it could not easily be ascertained here how that fact might be; but it was a respect due to all Courts of foreign jurisdiction, to suppose that the form of their proceedings had been regular, unless a manifest defect appeared on the face of the sentence itself; that as to the effect of the sentence, it was not to be considered barely on the critical meaning of the word *affirm*. That it did not adopt the former sentence in blind terms, but recited the usual reference to the examinations, and to the facts of the case. That the intention of the Court was obviously to correct the defect of the former proceeding, and must be taken to be substantially competent to that purpose. That a further argument arose on the face of the claim, which would operate as a complete bar, viz. that the capture and condemnation in question were acts of the late war. A treaty of peace had intervened; which must be taken to have effectually established the title of the *captor*, and all other titles derived from him, on the ground of the *uti possidetis*, which may be considered as the natural basis of every treaty of peace, when no other conditions are expressed.

On the part of the Captor the King's Advocate contended—That although the treaty of peace might introduce a state of amity between the belligerent nation, the neutral purchaser was no party to that contract, and could not derive any protection from it.

JUDGMENT.

Sir *W. Scott*.—I am of opinion that the title of the former owner is completely barred by the intervention of
of

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of peace, which has the effect of quieting all titles of possession arising from the war; and if the vessel has been transferred to the subject of another country, he also will be entitled to the same benefit from the treaty, as the captor himself would have been, if he had continued in possession. It is admitted that as to the enemy it would have this effect, and that it would not be lawful to look back beyond the general amnesty, to examine the title of *his* possession. If *his* property is transferred, the purchaser must also be entitled to the benefit of the same considerations, for otherwise it could not be said, that the intervention of peace would have the effect of quieting the possession of the *Enemy*; because if the neutral purchaser was to be dispossessed, he would have a right to resort back to the belligerent seller, and demand compensation from him. I am of opinion, therefore, that the intervention of peace has put a total end to the claim of the *British* proprietor, and that it is no longer competent to him to look back to the enemy's title, either in his own possession, or in the hands of neutral purchasers. As to any effect of the new war, though *that* may change the relation of those who are parties to it, it can have no effect on neutral purchasers, who stand in the same situation as before. Those purchasers, though no parties to the treaty, are entitled to the full benefit of it; because they derive their title from those who are.

Further proof of the property ordered—*Finally restored* 27th Sept. 1806.

Dec. 17th and
20th, 1805.

Judgement on
the Report of
the Registrar
and Merchants,
as to sundry Fees
charged by the
Marshal for in-
surance, apprais-
ment, Delivery,
S.c. &c. &c.

THE RENDSBERG, NYBERG, Master.

THIS was a case on objection to the report of the Registrar and Merchants on sundry charges exhibited by the Marshal of the Court against the ship and

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and cargo, for the several services of removal, sale of the ship, unlivery of the cargo, and subsequent delivery to the claimants on bail (a).

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The cause was argued much at length on the facts and averments set forth in the act of Court, by *Laurence and Swabey*, on the part of the Marshal, and by the *King's Advocate* and *Arnold* on the part of the Admiralty.

JUDGMENT.

Sir *William Scott*.—This was a valuable *Dutch* ship which had been seized at *St. Helena*, and was by the governor sent on to *Falmouth* under the care of a Mr. *Smith*, who had been the captain of an *East-India* packet, and describes himself to have laboured under considerable difficulties during his passage, from a disorderly crew, and a number of *Dutch* prisoners, who happened to be on board. He had stipulated with the Governor of *St. Helena* for 60*l.* per month,

(a) *Note.* The Charges in dispute, as set forth in the report of the Registrar and Merchants, were,

	Allowed.			Disallowed.		
	£	s.	d.	£	s.	d.
A charge of Marshal's fee for removing the ship 475 <i>l.</i>	-	-	-	-	-	-
As all travelling expences are charged for, the Registrar and Merchants allow a proper recompence	150	0	0	325	0	0
A charge for unloading the cargo, value, 38,000, at $\frac{1}{2}$ per cent. 440 <i>l.</i>	-	-	-	-	-	-
Allowed for the Marshal and Assistants attending the unloading, &c. and ordering appraisement of the cargo, value 63,686 <i>l.</i> 7 <i>s.</i> 6 <i>d.</i> at $\frac{1}{2}$ per cent.	318	8	8	121	11	4
A charge for delivering the cargo to the claimant 318 <i>l.</i> 8 <i>s.</i> 6 <i>d.</i>	-	-	-	-	-	-
Disallowed, as the Registrar and Merchants think the foregoing allowance sufficient	-	-	-	318	8	6
A charge of poundage on the sale of the ship, on 8050 <i>l.</i> at $3\frac{1}{2}$ per cent. 281 <i>l.</i> 5 <i>s.</i>	281	5	-	-	-	-

including

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including his table and all expences, and has since received payment at that rate for sixteen months, during which time he was continued in command. On the arrival of the vessel at *Falmouth*, claims were given for the cargo on behalf of neutral merchants, and proceedings were instituted on the part of the Admiralty, in consequence of the seizure having been made by non-commissioned persons. It was thought to be advisable by all parties that the ship and cargo should be removed to *London*. A commission of removal accordingly issued at the prayer of the Proctor of the Admiralty, directed to the Marshal, and a conjectural valuation was taken at 88,000 *l.* for the purpose of effecting insurances, the policies for which were to be lodged in the registry, previous to the removal. The ship, being a *Dutch* vessel, was condemned as a droit of Admiralty, and was as such sold at public auction by the Marshal for 8050 *l.* The cargo, which had been conjecturally valued at 88,000 *l.* was decreed to be delivered to the claimant on bail, to answer the order for farther proof; and for that purpose a valuation was more correctly taken by appraisement at something above 63,000 *l.* which has since been paid into Court on the ultimate condemnation of the cargo.

The Marshal has brought in his bill of charges for the various services performed by him, and they have been considered by the Registrar and Merchants, on a reference made to them by the Court. The result has been, that some of the charges have been allowed, and some disallowed, and each party objecting to certain allowances or disallowances, have stated their objections to the report of the Registrar and Merchants in an Act of Court. The case now comes before me, upon these allowances and disallowances, and carries with it the greater importance,

portance, as the decision is likely to direct a Rule of Practice to govern other cases generally, in which the Marshal acts, and between the Marshal and all other parties whatsoever, as well as his more immediate employers the Lords Commissioners of the Admiralty.

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I trust I need not profess to bring to this discussion at least the dispositions which ought to meet it, an anxiety to attend, on the one hand, to those considerations of public utility, in which the real honour of the Court is so deeply involved, (for it can have no honour independent of its subservience to public utility,) and, on the other hand, to those sentiments of a liberal, and even kind justice, which it is bound to feel towards those immediately employed in exercising its functions. It would be a gross dishonesty to lose sight of the public utility, from an undue partiality to individuals; but it would be a dishonesty not less base, nor less detestable in the motive, to sacrifice rights which the Court is bound to protect, to any pursuit of an unjust and therefore transient popularity.

The charges are made in a document, entitled, according to ancient style, "*a bill for fees and disbursements*" making no mention of commission or mercantile profits. The disbursements have been settled and allowed, therefore the present question turns merely on fees—fees which, however arising, the Marshal conceives he has a legal title to demand, and to have that demand sustained by this or any other Court, in which his title may be questioned.

All fees of office, *properly so called*, are presumed to have a legitimate foundation in some act of a competent authority, originally assigning a fair *quantum*

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meruit for the particular service. The evidence of such fees is found best, and most usually, in written documents, either ancient, or modern supposed to be founded upon more ancient : and these are of a deciding character, when they have been generally recognized under such an impress of authority. In many cases unwritten usage is all the evidence that can be obtained, and is sufficient where it is uniform, and so admitted. When there is neither the one nor the other of these species of evidence, a claim or remuneration may still be supported *pro opere et labore*. It may be properly made a fee of office, for future services of the like kind, by competent authority ; but it cannot be strictly claimed *as such*. It wants the certainty and uniformity, that characterize a *fee of office*, properly so called, though it may on other considerations be justly due to the claimant.

Most of the charges which have been brought forward, appear to be rather of this description. They are not referred to any table, nor to any established course of practice much older than the Marshal's own time. The Registrar and Merchants seem to have estimated all the claims much in the same way of equitable allowance, *pro opere et labore*, though with a different result.

The articles questioned on one side and the other are four in number. 1st, 475*l.* on the removal of the ship and cargo, charged at $\frac{1}{4}$ per cent. on the value, but reduced to 150*l.* 2dly, 440*l.* for unlading the cargo at $\frac{1}{4}$ per cent. reduced by a different computation of value to 318*l.* 3dly, 318*l.* charged at $\frac{1}{4}$ per cent. for the delivery to the claimant, disallowed altogether, on a supposition that the sum allowed in the foregoing article was sufficient. 4thly, A poundage

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poundage of $3\frac{1}{2}$ per cent. for the Marshal and his broker on the sale of the ship, of which I will only say at present, that it is at least charged in an improper form, in confounding together what should be stated separately, in order that the pretensions of the Marshal, and his Broker, may be distinctly ascertained, and that it may appear how much is paid in the way of disbursement, and how much as a *quantum meruit* to the Marshal.

These charges altogether amount to above 1400 l. and if the cargo had been sold, (which the Marshal claims also a right to sell, where it is to be sold,) there would have been a clear profit of office of 3000 l. acquired by an officer of a Court of Justice, in the course of one cause depending in that Court. I must confess that such a general statement is at least awakening. I know nothing like it in any other office of the same description. It may happen that by forfeitures and fines very large profits may occasionally, and in the result of one decision, fall into the lap of Grantees of the Crown, under ancient grants made in the improvident simplicity of former times. But this is not of that kind; it arises not from eccentric penalties, but from the mere execution of the ordinary processes of the Court, in which the party is an officer. Is this an office of high and burthensome dignity? Respectable, most undoubtedly it is, but not of the very first order even in the Court to which it belongs. It is an office requiring the valuable qualifications of common prudence, common integrity, and common civility in the holder; but well satisfied by these endowments, and demanding no peculiar elevation of talents, no laborious preparations of study,

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and personal accomplishments, and imposing no particular obligations of splendor and expence;—and yet it is very evident that this office may, by easy possibility, from the occurrence of two or three such causes within a short period, far transcend in any competition of profits offices of any kind whatever, offices the most dignified in rank, and the most important in functions, that are known to the Establishments of this Country.

These general considerations are certainly not decisive, for it may happen, notwithstanding, that its duties being very laborious, and very continued, may be not overpaid. But *they* certainly *must* excite upon the first view so presented a strong impression, either that the Court is unfortunately constituted for purposes of public convenience, or that its rules have been somehow or other misapplied, in producing such an unnatural result.

The first charge is a commission on removal, at $\frac{1}{4}$ per cent. on the ship and cargo, amounting to 475 l. but reduced by the report of the Registrar and Merchants to 150 l. To this reduction the Marshal objects, not that such an allowance is unconformable to any table of fees, for no fee for such a service is to be found in the table referred to, or in any other; nor that it is unconformable to former usage, for no ancient usage whatever is shewn, but that it is disproportionate to what is equitably due, as a *quantum meruit*, for care attention and responsibility in the service. The fact that there is no fee either in the table or usage, leads rather to this conclusion, that this particular service is not appendant to the office; because the table must be understood to describe the profits

profits belonging to each function of the office, or if it had been accidentally omitted there, (as I think some things are omitted), or if it had grown up since, it would still appear in the uniform practice of the Court. It must have happened, that ships and goods claimed by the Admiralty have been removed, and if it had been the Marshal's Office to remove them, there could have been no lack of precedents. None are produced, and I understand that the practice has occasionally been otherwise, therefore it is clearly no function of his office; and it appears to me that there are strong reasons of propriety, for holding it to be by no means naturally, or perhaps prudentially, connected with the office.

The terms of the commission rather imply, that it should be addressed to a naval person; They are, "*to remove*," and not "*to cause to be removed*;" and no man acting in his own concerns, or reflecting much on subjects of this kind, would commit such a trust to a mere landsman, or to a person having no more knowledge of navigation, than the imperfect information which a landsman of ordinary curiosity may be supposed to have picked up. I confess I think, that a sea officer would have been at least as proper for such a service, as the officer of any Court of Justice whatever. The employment as little suits the officer, as the officer suits the employment: for the effect of this employment is to draw him to a distance from the proper sphere of his occupation, which is described in the table produced, and is in practice found to consist "*in attendance on this Court, and in executing its processes in the port of London.*" It is therefore evident that on very wise grounds this is a function not belonging

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to the Marshal as such, and which if committed to him, is committed upon the same terms as to any other individual.

What are the *duties* of such a trust? to collect a proper crew, if there is no such crew already belonging to the vessel—to provide all necessary supplies for the special voyage, and all these at the expence of his employers, (for he is not bound to advance a sixpence under his commission)—and to direct the crew in their voyage from the one port to the other. As far as I can judge, his duties, under a commission of removal, are nearly those of a confidential master of a merchant vessel in a similar situation and no more. All that is required of him is to remove the vessel and cargo. That is the ordinary duty of the master, and nobody can under the commission expect more from him. The Marshal, it is true, may engage in other services, but in that he goes beyond the commission of removal. In considering the case of removal, I have no business with volunteer services of that kind—they may be services of Agency; but if the Admiralty does not acknowledge him in that character, I have nothing to do with claims of that species.

It may be proper however to notice the services, which the Marshal has particularized upon this head, as they are described in the act. First it is stated, “that he was employed in ascertaining the value for the purpose of effecting the insurance.” I confess I am somewhat at a loss how to *ascertain this fact*, when I perceive that the certificate of the value was brought in by the claimants, and that the policies of insurance were produced by them. Secondly, it is stated, “that he travelled to *Falmouth*, and settled the tradesmen’s bills, hired mariners and fitted the vessel for coming round, and came with her,
and

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and brought her in safety to her moorings." What is the peculiar merit of these services? It is implied in the very acceptance of the commission, that he should go to *Falmouth* and attend the ship, and all the expences of his journey are to be liberally allowed in his disbursements. He pays the tradesmen's bills, and hires mariners, at the expence of his employers, and if he advances money, as he is stated to have advanced 729 *l.* he is entitled to charge interest upon it; he was not bound to have supplied any money, and might have demanded it of his employers beforehand. It is extremely obvious that in these services there is no particular merit, beyond the ordinary discharge of the trust which he had accepted. Or if they could any of them be thought to amount to services of special agency, yet if he is not acknowledged in that capacity by his employers, the Court could not consider them in estimating charges growing exclusively out of his commission.

On some of the facts contained in this representation, I feel a difficulty in admitting their correctness, when I see what is stated in the affidavit of Mr. *Carne* and Mr. *Pellew*. Mr. *Carne* is an agent of the *East India* Company at *Falmouth*, and was applied to by Captain *Smyth* on his arrival there. He states, "that he did actually advance several sums for the supply of provisions and other articles to Captain *Smyth*, particularly a new 18 inch cable of 110 fathoms, at the expence of 180 *l.* 11 *s.* 2 *d.*; that he continued to supply the said ship till the arrival of the *Marshal*, who asked no farther assistance of him, but *that* he would have advanced any farther sums that had been required of him." When I look also at the bill of money advanced by Mr. *Pellew*, the Agent for the Admiralty, for the hire of mariners, amounting

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to no less a sum than 432 l. I confess I am at a loss to understand what could be the necessity of any advances on the part of the Marshal; or if there had been the utmost necessity, the whole that could have arisen from it would be, that he would have a right to charge interest on the money so advanced.

There is, also, I observe, an affidavit, made by Mr. *Smyth*, bearing testimony to the continued exertions of the Marshal, and to the merits of his services on board, to which I can give ready credit, knowing as I do the prompt activity of this Officer. Yet there are one or two particulars stated in this affidavit, as also one or two other circumstances mentioned in the act, which I do not very exactly understand. Mr. *Smyth* says, "that the ship was lying with two Indian cables; that his own credit was exhausted, (which is not very intelligible if the agent for the Admiralty was ready to supply him;) that on the Marshal's arrival, he took a boat late in the day, and went to *St. Mawes*, at the hazard of his life, and got a cable made that night." It is stated also, that the Marshal purchased a cable for 182 l. the precise sum which I perceive was paid by Mr. *Carne*, and for a cable of exactly the same dimensions, and which I am therefore tempted to suppose must have been the same. As to what is said of the Marshal's activity in going off in a boat that night at the hazard of his life, I do not mean to undervalue the zeal which he shewed on that occasion; yet I cannot but observe, that it would have appeared to me to be fully sufficient for the fair execution of his duty, if he had gone by land in a chaise the next morning. It is stated that the Marshal was employed in these services several weeks, upon which I cannot but remark that the commission bears date the

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17th August, and the certificate of its execution on the 3d September, so that the execution of this commission comprehended at most a few days more than one fortnight. Upon the whole of this part of the case it appears that the services are either of two descriptions, either such as every man is bound to perform, who accepts a commission of this nature, or such as do not belong to it, and therefore such as I am not at liberty to consider, in estimating the services belonging to that commission only.

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There is however less necessity for considering the special services from what follows, since it is stated "that the Marshal uniformly charges the same in all cases of removal." It is therefore not a charge arising out of special circumstances, but considered as appendant generally to the execution of such commissions. The claim is for a percentage on the value of the ship and cargo, and the general grounds alledged for such a claim are care and attention, the *opus & labor*, and responsibility; and it is said, that as these increase in proportion to the value, so ought the remuneration—Now in the first place, that the *opus & labor* increase with the magnitude of the value is not strictly true; for there may be just as much trouble in executing such a commission on an empty ship, as on a ship loaded with the most valuable cargo. Secondly, if an increase of attention was generally required by an increase of value, it would by no means follow, that it founds a claim for a percentage remuneration on the value, rising in the same arithmetical progression. It may be very fit that the remuneration should increase, but very unfit that it should increase in that ratio; because a man may be very liberally rewarded for his care and attention, by a much smaller

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smaller proportion of the value of a large object, even if it was established, that the remuneration was to be founded on value in any one of the first stages. A master of an Indiaman has larger pay than the master of a collier, but neither one nor the other any thing like a percentage commission on the value. The one has larger pay, because there is more of the *opus & labor* to be furnished, more skill, more time and more personal hazard, and certainly with some general reference to the ability of the fund, which is to afford the remuneration; but there is no percentage originally, still less any percentage on the increase. I am clear therefore that the principle of a percentage totally fails, so far as mere care and attention are concerned.

But it is added, "*that a responsibility accrues, and that this must be proportional to the value of the property, for which he is responsible.*" When the question is asked, what is the nature of this responsibility? it is said, that it consists in being answerable for all *particular embezzlements*; It is not pretended, that he is answerable for casualties *generally*, but only for *embezzlements*, and for them only, because *the underwriters will not insure prize property, but with the exception of particular average.* That certainly leads to no necessary consequence; it does not follow, that because *A.* is not answerable, therefore *B.* is answerable, since *neither* may be answerable; and it remains to be shewn that *B.* is under any such responsibility.

What is the foundation of this responsibility? Every man who undertakes a commission, incurs all the responsibility that belongs to a prudent and honest execution of that commission. Then the question comes, What is a prudent and honest execution

execution of a commission?—The fair performance of the duties that belong to it; I have described those duties, and I do not conceive the commissioner to be responsible further. As to embezzlements *at sea*, it is not easy to understand how they can well happen at all; and therefore all the outcry that has been raised is about the plundering *in the River*, in a way, that would lead us to suppose that the shores of this River were lined with Buccaneers. I do not understand that rich *East India* ships, or *West Indiamen*, double their guards in the River on such an apprehension; they depend on the sufficiency of their crews. But if they do not, and really double their guard, it leads to nothing more than to impose a like obligation on the commissioner. He must provide a competent number of persons to guard the property; having so done, he has discharged his responsibility, unless he can be affected with fraud, or negligence amounting in legal understanding to fraud. It is certainly true, that the commissioner is responsible for a negligent or dishonest execution of his trust. If he knowingly takes a master and a crew dishonest or negligent, That is *dolus* or *negligentia dolo proxima*. If losses happen in consequence, he may become answerable, *quia nequiter se gessit*—because he is guilty of the *negligentia maliciosa*—he has not executed his trust; he becomes answerable in that case for his own wrong doings, and not for that of others, against which he has used honest and reasonable caution.

The commissioner employed is *pro hac vice* the servant of those who employ him. What is the obligation of a servant? If I send a servant with money to a banker, and he carries it with proper care, he would not be answerable for the loss if his pocket was picked in the way;

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way; but if instead of carrying it in a proper manner and with ordinary caution, he should carry it openly in his hand, thereby exposing valuable property so as to invite the snatch of any person he might meet in the crowded population of this town, he would be liable, because he would be guilty of the *negligentia maliciosa*, in doing that, from which the law must infer that he intended the event which has actually taken place.

A common carrier, or a master of a barge, is answerable for embezzlement and robbery; but the case of such persons constitutes an exception to the general rule, founded in necessity, and confined to persons carrying for hire in their general occupation. Being a person unknown to his employers, and not employed in special confidence, the public conductor *rerum vehendarum* is to answer for all risques, otherwise there would be no possibility of guarding against combinations between this unknown person and others with whom he might collude. But a commissioner is not of this description. He is selected in special confidence; his stipulation with the law binds him to common prudence and common integrity; for all that lies beyond this, his employers are answerable if any body is answerable, for even that may depend upon circumstances. If the property had been decreed to be restored, it does not follow that the Admiralty would have been answerable for the deficiency. This Court has held private captors discharged from responsibility, where the property has been shewn to be missing without any default on their part. At any rate the Commissioner is answerable only to the Court and his employers, and he will satisfy any demand arising from the responsibility

libility which he has entered into to both, if he shews that he has acted with the honesty, and the discretion, which the nature of his commission requires.

Two cases have been cited, not immediately applicable to the cases of removal, but as not irrelevant to the general question of responsibility arising from official possession; The *Buena Ventura*, before the Lords, and a case before this Court (a), in which the Marshal was held responsible for a boat that had been lost under his custody. In the first case, the Marshal properly answered, that he was not in possession, as the property was under the King's locks; Having made that fact to appear before the Lords of Appeal, he was dismissed of course, without any determination upon the question of his responsibility, if the fact had turned out otherwise.

In the case before this Court, he was held liable, but under what circumstances? A complaint had been openly and repeatedly made in Court against the Marshal for loss by negligent custody, and no answer was opposed to it. There was not even an appearance given, and the Court was called upon to wipe away the dishonour of having a charge against the custody of the Court unanswered, by throwing the indemnification on him. But if an appearance had been given, and any denial of loose custody had been opposed, the Court would have thought it no more than a legal and proper confidence in its own Officer, to have thrown the proof of culpable negligence on the other party. No such responsibility therefore is shewn, as can found any claim to be paid in proportion to the value of the property. Even if a responsibility was proved, it would not lead to any such consequence. It is not the way in which the master

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(a) 7 G. 2. c. 15.
26 G. 3. c. 86.

master of a vessel, is paid. His wages are not in any such proportion, although by the principles of the maritime law he still remains responsible for the bills of lading which he has signed, notwithstanding that by the modern Statute Law of this Kingdom (a) the responsibility of the owner of the vessel is limited to the value of the vessel and the amount of the freight due.

It is clear to me then that neither *pro opere et labore*, nor on the ground of responsibility, can a percentage charge be maintained; and nothing can be more clear, than that of all possible modes of remuneration this is the least consonant to general principles of equity. Though it professes to be founded on proportionable trouble, care, and responsibility, it in fact overlooks them all in its actual application. It is evident that all these must increase with the length of the voyage to be performed, the difficulty of navigation and personal attention, and the season of the year in which it is undertaken. No man can deny, that it is an operation of much less care and trouble, to bring a valuable ship from *Dover* in summer time, than it would be to bring the same ship from the port of *Glasgow* in the very depth of winter. Yet, here is one measure provided for all cases, long or short, easy or difficult; for the Act informs us, "that this percentage is the commission, which the Marshal uniformly charges on the value of all ships and cargoes removed by him from any of the out-ports of the kingdom to *London*;"—the same for a voyage from *Harwich* as from *Liverpool*. It is unnecessary to say more on the equity of such a measure.

The question then comes, what is the true measure? It is observed in the Act, "that the Registrar and merchants ought to have stated to the Court the allowance

made

made to other persons for removing ships and cargoes." If they *could* have done so, it might have been proper. But, I presume, it was not within their knowledge, for this plain reason, that these allowances are usually settled by private and previous agreement. The person who obtains the commission, whether captor or claimant, makes his agreement with the person whom he employs, and the Court knows nothing of it; and there seems to be no reason why this course should not be pursued by those who act for the Admiralty.

It is evidently a proper course, because all the material circumstances can be previously considered,—the state of the ship, the length of the voyage, the season of the year, and every thing else that ought to be considered in the construction of a fair and reasonable bargain. As these commissions are not grantable to the Marshal *ex debito justitiæ*, both parties are perfectly free. The person who is to be employed is free, if the other parties do not offer liberal terms, and they are free, if he demands what they think exorbitant. As to any difficulty in coming to an agreement, I see none that prevents other persons from making their previous arrangements; and therefore I can see no difficulty that should stand in the way of those who act for the Admiralty, who have exactly the same duties to perform, which those have to perform, who are acting in their own concerns. And if so, where is the danger of that inconvenience of perpetual litigation, which is held out in *terrorem* to the Court? Make your previous contract, and no such danger can exist, but in such extra cases as form reasonable exceptions to any general rule. If I am asked what is the proper basis of an agreement for such a purpose, I have no hesitation
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in saying, that, in my opinion, the proper basis is the usual rate, at which ships of such a description, are conducted on such a voyage, at such a season, by proper naval commanders.

In saying this, I do not mean to exclude an equitable enlargement founded on various considerations. The Marshal is not, like such a commander, in his ordinary and continued employment; it is a detached service, which takes him out of his common sphere of general occupation. On these grounds some latitude may, perhaps, properly be indulged; and I do not mean to exclude what may be called a guarded liberality to a confidential officer of a Court of Justice, acting in a business of great magnitude and value; but still the basis will be the same. I observe, that Mr. Smyth brought this ship from *St. Helena* to *Falmouth*, at the rate of 60 *l.* per month, including all his expences. Considering that he was incumbered with a *Dutch* crew, I may suppose that he was in some degree personally employed in the navigation of the vessel himself. I may presume then, that being provided with money, and another crew, he would have undertaken to conduct the vessel to *London* on similar terms. It is therefore quite impossible to accede to a charge of 475 *l.* and all personal expences over and above paid, for a voyage of one fortnight. The merchants have allowed 150 *l.* upon their opinion of a *quantum meruit* for this and other services, rather irregularly connected with it, and I think they have allowed very liberally—One hundred and fifty pounds for one fortnight's work, with the former master on board navigating under him, and whilst all his other emoluments were going on under the care of an attentive deputy in *London*, appears to

me to go very largely, indeed, towards the profits of a very lucrative office. But I must again say, that I have only to look at this charge unconnected with the office, for it has no connection with the office whatever. Regarding it likewise in that way, I think that the Registrar and merchants have made an ample and most munificent allowance, which I confirm.

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The next article which I shall consider, is the charge on the sale of the ship, after she came into the port of *London*, 281 *l.* 15 *s.* at $3\frac{1}{2}$ per cent. as a poundage to the Marshal and the broker whom he employed. In the first place I strongly object to this mode of lumping together the Marshal's and the Broker's poundage; and I must direct the Registrar in future not to pass any accounts so expressed. The payments to the broker are a disbursement, and ought to be charged by the Marshal as such separately, that it may be seen distinctly, as it ought, what the Marshal pays for other person's trouble, and what he charges as the official fee for his own.

It is understood, however, that $2\frac{1}{2}$ is the fee claimed for the Marshal, and 1 per cent. for the broker. On this article it is observed on the part of the Admiralty, in the Act, "that there is an allowance made in the table of fees, of 1 per cent. for all sums under 200 *l.* and of $\frac{1}{2}$ per cent. for every hundred beyond that sum." That this is not an authentic table can scarcely be contended, since it is a table to which the Marshal himself refers, as the authority for some of his charges; and it is notoriously that standard by which the fees of the officers of the Court are regulated. It is very possible that by lapse of time and change of circumstances, some or many of these fees may have become disproportionate,

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and very proper to be changed ; but the change must be made by competent authority. The officer himself cannot make it. He cannot set up his own practice, nor even the unfashioned practice of a predecessor, as any authority in such a matter ; though such a practice may very fully, as it does, exonerate him from any imputation of personal misconduct.

In argument a distinction has been resorted to between the Prize Court and the Instance Court ; though the Act itself, on the part of the Marshal, points to no such distinction, but seems to ascribe to this table of fees the same sort of authority in both ; and as far as lapse of time is concerned in shaking that authority, it clearly has an equal operation upon both. Such a distinction cannot be relied on with any effect, because this table evidently points to the Prize Court in some particular cases, where it marks a difference, and thereby excludes the supposition of any such difference in all other cases, where no such distinction is marked. It is to be observed also, that the Marshal acts upon this very table in these prize accounts ; for on what other ground are various sums charged, but that they are such as this table prescribes ? It can never be said, that the Marshal shall use the table, where it makes for him, and that he shall be at liberty to desert it where it happens to be less favourable.

It remains to be asked then by what authority such an equitable alteration, if necessary, is to be made ? By His Majesty in Council—to whom such a power is reserved by statute, to alter the table of fees in any of his Courts of Admiralty. That this Court has clearly such a power is more than I can venture hastily to assume. The Court might, I think, make equitable
allowances

allowances in some cases not specifically provided for in this table ; as in cases of journees, or other contingencies, for which, owing to the change in the value of money, the old allowance is practically inadequate, and where there is therefore a physical necessity for an extraordinary allowance, or the journees could not be performed. But where the fee is not so small that the service cannot be undertaken, the Court must be much better satisfied of its power to alter specific fees, than I am at the present moment, before it can admit that any confirmation of such altered fees by the mere authority of the Court itself, will support the demand against the objections of those, who may have a right to object to such an allowance, in other cases in which they are concerned.

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But the fact is, that it has received no such confirmation whatever ; for all that is shewn is, that three cases have passed, in which, the Proctors not objecting, the Court has confirmed the Registrar's report, in perfect ignorance of what that report consisted : For Courts do not stir questions between parties who are agreed. All the confirmation that is implied in those cases, is the consent of the adverse Proctor, properly or improperly given. It can have no authority in such a matter ; the Court is a total stranger to it : and I have to lament that, after years of silence, the invidious task has devolved on me, of calling back this office to its proper standard. But if any alteration is to be made, upon what principle is it to be constructed ? Certainly on none derived from the practice of merchants. I do most entirely repudiate all analogy between mercantile profits and official charges. The merchant charges his commission because he is a merchant. The Marshal has not a right

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to charge it, because he is not a merchant. He has not the education of a merchant, nor the functions of a merchant. In the theory of the thing, however relaxed the modern practice may be, a Merchant is expected to possess a knowledge of the general usage and conduct of trade; he is to watch the state of markets at home and abroad, and to acquaint himself with the course of exchange; he is to catch the proper opportunities of selling, and to make large advances on the credit of his consignment, as soon as it is received, though it may not be converted for months; he has to maintain an expensive establishment of a compting-house and clerks; he has to receive with decent hospitality the agents and partners of his foreign correspondents who may occasionally come into his country; he has to keep up an extensive correspondence; and what is very material, if he receives a commission on the cargoes of other merchants, he pays a similar commission on his cargoes consigned to them. "*Cædimur, inque vicem præbemus crura sagittis.*" There is a mutuality in these mercantile profits, which is never to be put out of sight, in considering the general propriety of the charge as a mercantile practice.

Scarcely one of these circumstances applies to the Marshal. He has not to watch markets, for he is bound to sell within a time prescribed. He is not expected to advance any money; he has no foreign correspondence to maintain; no establishment of a compting-house to support; he has no cargoes to consign to others, nor any commission to pay. He is a person of a totally different description—a person of a legal constitution and with legal duties; and though some of his duties may have a mercantile mixture in them, he does not transact them as a merchant. He acts

altogether as a legal officer, and must be paid as such. I do therefore *ex animo* expunge from the vocabulary of the Court the very term *commission*, as far as it relates to charges for services performed by the Marshal, or any officer of this Court.

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I have had a paper put into my hands some years ago, on my accession to Office, which was delivered to me by the Marshal as an account of fees claimed by him. It describes at the same time his pretensions to be employed in all sales of property under adjudication, and his duties in conducting such sales as are committed to him in the following terms. " On all sales of ships and goods where decrees of appraisement and sale issuing from the prize Court are directed to the Marshal, (which he submits ought to take place in all cases of adjudication by the Court of Admiralty) the Marshal claims and takes the sum of 6 d. in the pound, or $2\frac{1}{2}$ per cent. on the gross proceeds, which charge includes all fees and poundage for appraisement, and on the specific act of sale included in the foregoing table, as also the commission to the Marshal, in the nature of agency, or commission *del credere*, for his risk and labour in disposing of the ship and goods, removing the same where necessary from place to place, securing the goods according to the directions of various Acts of Parliament, for the benefit of the parties concerned, advancing money without interest (in many instances to a great amount) for the payment of customs and duties, and attending repeatedly at the delivery of goods to all parties entitled, till he is discharged from his responsibility on account thereof, which responsibility has frequently continued for two or three years with great trouble and anxiety. In the execution of

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this laborious employment, it is also frequently necessary for the Marshal, in order to prevent injurious combinations, to buy in and resell goods; to give credit at his own hazard to purchasers and brokers, accounting for the money received from them as received at the time of sale, though the goods are frequently sold at several months credit, without which indulgence they would often fail of finding purchasers."

Now if the Marshal performs all this, what is it that the broker does for which he charges one per cent. ? I conceive that these are the very duties, for which the broker receives his consideration, and if he is paid his commission for performing these duties, surely the officer can have no possible right to charge specifically for the same. He must receive his legal fee, for a sort of general superintendence and no more. In the next place I can by no means admit that this is a just description of his duties. According to this representation, as soon as a commission is granted, he is to commence general merchant; Certainly not. It is no part of that duty which his commission imposes upon him. It is suggested, "*that he is the general agent of the parties, and has a right to agency:*" Certainly not. He is the agent of the Court, and he is to look to that remuneration, which the constitution of the Court allows. As to its being represented that it would be more beneficial to the party, that it should be otherwise, it may be so; but if it is not the constitution of the office, those who apply for commissions must be content to take them as the Court can grant them, and according to the opportunities and facilities of execution, which the process of the Court can give.

In speaking of this paper I have only one thing
more

more to observe, which is, that in accepting it, and directing it to be deposited in the registry, taking, as I have done, this opportunity of expressing my dissent to the positions contained in it, I shall think it an act of caution due to myself and to those who may come after me, to disclaim any intention of giving it the sanction of judicial registration, and to declare that my acceptance of it, and my direction to have it deposited in the registry, is not to be understood as conveying any private assent, much less any judicial confirmation of its contents.

Something has been said of the dignity of the office, and it has been assimilated to that of a sheriff. I certainly can have no disposition to detract from the dignity of the office, and I am willing to admit that he may be considered as a sort of marine sheriff. But what is the condition of a county sheriff on this very point? His profits on the sale of goods are regulated by a statute of 200 years standing, (29 *Eliz.* c. 4.) and no alteration has taken place to the present moment. In a case reported in 2d Term Reports (a); we may see the extreme strictness with which the Sheriff's allowance by that Act is construed at this day; Mr. *J. Buller*, expresses himself very strongly "that the sheriff cannot be allowed the expence of an auctioneer, or even the levy fee of a guinea, but that the sheriff and the Court are bound by the Act of Parliament;" Mr. Justice *Grose* also considers the matter with the same strictness. "At common law no fee whatever was allowed to the sheriff, then

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(a) Woodgate
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(a) p. 148.

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if he be entitled to receive any, it must be by Act of Parliament. Now by looking into the Act it appears clearly to have been the intention of the legislature that the sheriff should be paid in proportion to the sum levied out of the sum levied, and that the sheriff should only levy what was really due. I am clearly of opinion that in point of strict law, the sheriff is not entitled to any more than what is allowed by the statute. If the parties make any private agreement, that is a matter for their consideration, but it cannot form any part of the sheriff's demand." By the construction of that Act then it is held, that a sheriff is entitled to no extra charge whatever, not even the expence of an auctioneer. It is true that these observations are made upon the construction of an Act of Parliament, but when the Legislature has made no alteration in the rate of fees for such a length of time, it furnishes this Court with instruction, that is not inapplicable to the consideration of this case.

Not being bound by any Act of Parliament, I shall think myself justified in allowing a broker, because I conceive it to be an indispensable necessity in such sales, and for the benefit of the property concerned that they should be so conducted. After this payment is allowed, what is due to the officer of the Court? I presume that what is due to him, is what is provided for in the table of fees. Whether what belongs to the officer, according to that table, which is about forty or fifty pounds, is an adequate remuneration, I will not take upon myself to say, I am not prepared to say that such a sum, exclusive of the charge of a Broker, and all other expences, is not sufficient. If any objection can be sustained against it on this head, it must be a sub-

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ject of consideration elsewhere. In delivering my judgment upon it, I am under the necessity of directing the Registrar and Merchants to reform that part of their report which relates to this article, according to the ancient table of fees, allowing the charge for the Broker, as a necessary disbursement.

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The next charge in controversy is the sum of 440 *l.* charged as $\frac{1}{2}$ per cent. upon the cargo valued at 88,000 *l.* but reduced to 318 *l.* upon the appraised value of 63,000 *l.* for the specific services of unloading the cargo and directing the appraisement. It is objected to this article, *not* that something is not due, but that the charge ought to be calculated in a different manner, than by a percentage upon either value, or any value whatever. Supposing it to be properly chargeable on value, I am clearly of opinion that the value must be taken on the correct estimate of the appraisement, and not upon the loose and conjectural computation, formed for the mere purpose of leading the insurance. Upon no ground whatever could the latter be assumed, unless the Marshal was responsible for the conjectural value. I have already expressed my opinion, that he is not affected with any liability in value at all, except in cases where he has betrayed his trust by fraud, or a negligence approaching to fraud. Even there he would be at liberty to falsify the mere conjectural valuation, and to shew that the estimate was contradicted by the real value; —for instance, that a saron of indigo being lost, was at the market of such a value and no more. If that was shewn, a demand on the part of the owner to be indemnified for a loss merely ideal, would be a demand improper to be made, and very unlikely to be sustained,

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I have not; because I presume, that it is a service of but slight contexture, and is specifically provided for in the table of fees; and that it consists of nothing more than directing Mr. Coles to take on himself that employment, which I apprehend is not an operation of much time or labour. There can be nothing due *pro opere et labore*. It is said, that there is an inventory to be made; but when I look at what that inventory is, I see that it is little more than a copy of the manifest, and when I perceive that there is a remuneration provided for it in the table of fees, I do not feel myself entitled to say that, taken in conjunction with what I have otherwise allowed for the principal part of the same service, it is not competently remunerated. The execution of the appraisement is the exclusive work of the appraiser, and he brings in his bill. The property must not be twice charged for the same identical service. It is objected, that these operations being paid for with reference to time, may be improperly protracted. But it is sufficient to meet this objection, to say, that much may safely be trusted to the integrity of the public officer, and more to the vigilance of the parties, who have an interest in the due execution of the trust.

The last subject of controversy is the sum of 318*l.* charged by the Marshal, at $\frac{1}{2}$ per cent for delivery of goods to the claimant on bail, which has been disallowed by the Registrar and merchants; on the ground, that the *foregoing* allowance is sufficient;—that is, I presume, the allowance for unloading the cargo and ordering appraisement. In this reasoning I cannot concur. Having varied that foregoing allowance and very considerably to the disadvantage of the
Marshal,

Marshal, I cannot of course apply the same sort of consideration, which they have drawn from the sum allowed on the preceding article, even if that consideration had been originally correct. But I incline strongly to doubt, whether on any view of the matter I could have acquiesced in a mode of treating this subject as perfectly correct, which did not assign to each distinct act its distinct remuneration, so that it may fully appear without intermixture, and the confusion and obscurity and injustice arising from thence, what is the proposed value of each separate service.

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This being a separate service, and so admitted by the Registrar and Merchants, who have provided for it in a way in which I cannot exactly concur, the question returns upon me, What is the proper allowance for it to be made by this Court? Not accepting the mode of valuation of merit proposed by the Registrar and Merchants, I think myself bound equally to pronounce that I as little accept the valuation made by the Marshal, on a percentage of the value of the thing delivered, and this partly on the general reasons already assigned, that services of the law are not usually rated by a percentage on the value of the property, to which they are applied. There is surely as little ground for a rate of percentage in this service as in any other; for the labour and trouble of delivering in a peaceable manner a casket of diamonds, is not greater in itself, than that of delivering a box of ten-penny nails. The very possibility, that an officer might entitle himself to such an exorbitant profit on property of great value, for a service of no merit whatever, either active or passive, is of itself sufficient to proclaim

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claim the absolute injustice of taking such a measure for any such service.

But the manner in which the property is treated by the process of the law, is a decisive proof that it is not subjected to any such valuation for any such purpose. The property was deposited, under a commission of the Court issued to the Marshal, in the King's warehouses, under the King's locks, where it was kept agreeably to the terms of the writ literally taken, under the legal possession of the Marshal, but very little resembling a possession in fact; for being under the King's locks for purposes of revenue, I am not quite clear of the fact, that it is during such time even accessible to the Marshal. When the property has been seized by a commissioned vessel of war, either public or private, it is *de facto* under the joint locks of the King and the captor, although in the legal possession of the Marshal, according to the tenor of his writ. In the case of a droit, where the King in his office of Admiralty is the captor, it is under his locks alone. If an order comes for the release of that property, either on bail or for restitution, it is to be released to the party claiming, at the expence of the party who releases. The King's ship is bound to execute that order; The private ship of war is bound to execute that order; and the Admiralty also is subject to the same obligation, which is performed in the two former cases by the agents of the captors; and in the case of the Admiralty, by their officer, the Marshal,—in each case at their own particular expence, unless otherwise decreed by the Court. It is no charge upon the cargo; the parties are bound to deliver it in full, unless the
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Court has specially decreed, that the expences of the captor shall be a charge upon the cargo. On this supposition, against whom is the demand of the person who has been employed in the act of delivering it? against the person who has employed him in that act, and against him only. It is a personal demand totally unconnected with the value of the property in its own nature.

Unless therefore it can be shewn (which it certainly cannot) that this personal demand must for some other reason be in a given proportion to the value, not of the service performed, but of the property to which it is applied, it can be a demand only *pro opere et labore*. No general reasoning supports it in any other form. All general reasoning is against it; all natural equity is against it; unless therefore it can be shewn that there is such an inveterate usage, such a stubborn habit of practice, as to over-rule all general reasoning, and general equity, I am clearly of opinion that such a claim is perfectly visionary, and that the demand, if any, can be constructed only *pro opere et labore*. Then how is that to be estimated and by whom? In the case of agents of King's ships or private ships of war, it is settled by contract, and mutual agreement; the parties are volunteers on both sides. The Marshal is not so; because, I think, the Lords of the Admiralty are bound to employ him, and for this plain reason, that the writ goes, though not to the Marshal by name, "*yet to our officers in possession*," and I am inclined to think that he is to be considered as in legal possession from the tenor of the former writ. He is therefore necessarily employed, and is entitled to have his remuneration adjusted by this Court.

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Having already decided that the principle is to be taken *pro opere et labore*, I have only now to consider the amount. Having laid down a rule for unlivery, I am disposed to think that the same rule would not be incongruous for this service also. But as the Registrar and Merchants have merged the particular consideration of this article in the one preceeding, I am not sufficiently in possession of the facts relating to the nature of this service, so as to be enabled to give a definitive judgment upon it. As far as I am informed, I should conceive it is not a specific delivery, but a mere formal transfer of the custody, under the continued possession of the broker. But as it is my wish to determine this case not on its own individual merits only, but on such grounds as may serve for a general regulation in other cases, I shall direct the Registrar and Merchants to consider the nature of the service performed, and to apportion a reward, with this provisional direction only, that they by no means found the rate of remuneration on a principle of percentage. I will only add a request, that this enquiry^(a) may be entered upon by them, and adjusted, as speedily as the convenience of the Gentlemen employed will permit.

(a) An appeal being entered against this Sentence generally, no farther order has been made on this part of the Report.

On a subsequent occasion, the Court expressed its satisfaction, that this cause had been appealed, observing, that it involved a question very fit to be regulated by higher authority.

THE

THE TUTELA, REINTROCK, Master.

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1805.

THIS was a case of a *Swedish* vessel with a cargo of corn put on board at *Bordeaux*, in the month of *May* and *August*, 1805, and captured on the 20th of *August*, on a destination to *St. Lucar*.

Blockade, *de facto*, notoriety of the fact, sufficient to affect a master admitted to be cognizant, without warning on the spot.

The master had stated in his examination "that he had heard of the blockade of *St. Lucar* before he sailed from *Bordeaux*, that he had remonstrated with the shipper against pursuing his intended voyage, but that the shipper obliged him to proceed, as he had signed the charter party before his knowledge of the blockade."

On the part of the claimant, Laurence and Robinson.

This vessel had gone into *Bordeaux* in *April*, and had taken on board part of her lading in *May*, under a charter party made before any knowledge of the blockade of *St. Lucar* could have reached *Bordeaux*. She was detained under an embargo till *August*, and was then permitted to take on board the remainder of her cargo and proceed on her voyage.

These are circumstances which bring the vessel within the favourable considerations, which the Court applied to another *Swedish* vessel (a), under a doubt, whether the blockade of *Cadiz* and *St. Lucar* was known to the neutral master at the time of sailing. But it is said that the master has removed every doubt upon this question by his own admission, and that he is affected by the notoriety of the fact of the actual blockade, as much as if the no-

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tice was impressed upon him by a formal existing notification. The two cases are distinguishable, and in very important respects. A blockade *de facto* only is in its nature an ambiguous measure. It may be temporary in duration, or confined to military operations only. In regard to blockades of this species, however notorious, it is a common stipulation in treaties that vessels shall be entitled to a "warning from the blockading force," before they can be affected with the penalty of violating the blockade. When a blockade is notified by public declaration, it is very different. The nature of the interdict is described, it is proclaimed to be permanent, and the subjects of neutral nations have an opportunity of judging, within what bounds it is not permitted to them to speculate on a voyage to the blockaded port. All these topics of information are necessarily deficient in the case of a blockade *de facto* only. The notoriety that prevails is mere rumour; and though the master may have heard of it in that way, if he is entitled *generally* to a warning on the spot, his impression, which must necessarily be uncertain, will not preclude him from the benefit of waiting for more exact information on his arrival in the neighbourhood of the blockaded port. With respect to the particular circumstances attending the present blockade, it is impossible that any thing could be more ambiguous. The first blockade to which the notification referred, had been raised by the combined fleets, on the 10th April. It was afterwards resumed by Lord Collingwood, but his squadron was driven off by the appearance of the combined fleets on their return to Cadiz. It is said that Lord Collingwood arrived off Cadiz the 8th June, but

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but it does not appear in what manner the blockade of that port and *St. Lucar* was recommenced, nor with what view. In another case, the *Dispatch*, it appeared from a letter of Lord *Collingwood*, that he had liberated certain ships which had taken in their lading so late as 20th *June*, and as it is expressed, “before his arrival, or the commencement of the blockade.” Under these circumstances the neutral vessel, sailing in ignorance of the operations that were designed to be applied to the port of her destination, cannot, without warning, be held subject to the same penal consequences as would have attached, if the illegality of the voyage had been impressed upon her by public notification.

In reply, the King's Advocate.—It is not disputed that the blockade of *Cadiz* and *St. Lucar* existed at the time of sailing, and at the time of capture. The master himself admits, that he was cognizant of the fact. In these circumstances are comprized all that is necessary to affect him, with the penalty of an intentional violation of those rights of war, which he knew to be actually in force. The mode of communication is in all instances but the formal part of the general measure; and whether proceeding by notification or by notoriety resulting from the fact itself, the legal effect will be the same. The master acknowledges himself to have sailed in knowledge of the blockade, and must be taken to be so far the agent of the owner of the ship as to subject his property to confiscation.

JUDGMENT.

Sir William Scott.—This case arises on the seizure of a ship going from *Bordeaux* to *St. Lucar*, with a cargo

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cargo of wheat, which is claimed for the *Spanish* Government under the instructions of the 1st *February*, 1805. Those instructions contained an exception as to *blockaded ports*, and it was undoubtedly as incumbent on the Government of *Spain*, as on any individual, to take care, that the liberality of those instructions should not be abused. That there was a blockade existing on the port of *St. Lucar*, at the time when the vessel failed, is unquestionable, and must have been known to the Government at *Madrid*. If any contracts had been entered into for the supply of *St. Lucar*, it became a duty incumbent on that Government to rescind such contracts when the navigation to that port was interdicted. With respect to the cargo, it is impossible to entertain a doubt that it was going to *St. Lucar*, and in violation of the letter and spirit of the instructions, consequently *that it must* be pronounced subject to condemnation.

The only question is as to the ship, which may stand in a different predicament. Whether that part of the case is so favourable as to escape the penalty attaching on the cargo will depend on other principles. The ship appears to have been a *Prussian* vessel, which had been lying some time in *Bordeaux*; and if the matter had rested only on the general notoriety of the blockade at *Bordeaux*, at the time, it might have laid a ground for that sort of indulgent consideration, which has been pressed upon the Court, as due to ships lying in the enemy's ports, to which information may be supposed to travel with much uncertainty.

It is contended, that in such a case the Court will not press too rigidly the consequences arising from general

neral inference only. If the case stood on mere notoriety alone, there might be room for that kind of argument; but there is a particular circumstance in this case which deprives it of the benefit of such considerations. The master says that he was informed by his correspondent at *Bordeaux*, that *St. Lucar* was under blockade. He received information, therefore, in the most authentic manner, from his correspondent at *Bordeaux*, to whom he was referred by his owner. And with respect to the nature of the blockade, there could have been no more uncertainty as to the character of the blockade, than as to the fact; because if it had been only a military blockade, confined to the exclusion of ships of war, as it is suggested it might have been, or if the master's impression had led to the supposition of its being of that nature, no objection would have been raised against going on, as he must have imagined, in perfect safety. He seems to have entertained no doubt upon that point, but to have acted only under an opinion, that because he had signed the charter-party he was bound to proceed. I conceive the law is not so, but that he would have been justified in refusing to go on. As in all other contracts that become illegal, he might have protested against being any longer bound by his charter-party. Does he apply to his own Consul, or to the Courts of Justice? If he had, unless all the first principles of justice are totally disregarded in that country, I cannot suppose that they would have refused to exonerate him from the obligation of his contract, or that he would have been actually forced out of port.

He does not appear to have applied for any such redress. If he had, indeed, it could not be held in this Court, that his mere engagement to do an act which had become illegal, however injuriously pressed upon him by the

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the artifices of the enemy shipper, could exonerate him from the penalties consequent upon it. Unless it could be maintained, then, that the ship is justified by the direction of the employer in the enemy's country, I can find no principle on which the vessel can be relieved. Such a position would be altogether untenable. I am therefore under the necessity of pronouncing, that this ship, as well as the cargo, is subject to condemnation.

OB. 30th,
1805.

THE GUTE ERWARTUNG, GAY, Master(a).

Blockade—
Havre. Approximation to the blockaded port, with a determination to go close in under the shore, though for the asserted purpose of taking a Pilot to Caen not allowable.

THIS was a case of a *Lubec* ship that had come from *Oporto*, with an asserted destination to *Caen*, but was captured twenty miles to the north-west of that port, and about the same distance from *Havre*. It appeared that she had arrived off *Cape Barfleur*, on the 23d *September*, at twelve o'clock at noon, and had then stood off the coast till about two o'clock the next morning, when she changed her course, and was steering, according to the master's evidence, "in a course direct to *Havre*, and with an intention of going on close under the land, for the purpose of taking a pilot on board to carry him to *Caen*."

JUDGMENT.

Sir *William Scott*.—This is the case of a ship that is asserted to have been bound to *Caen*, and to have been proceeding towards *Havre* in quest of a pilot, to carry

(a) On the 4th of *August* 1807, this case was heard before the Lords Commissioners of Appeal, and affirmed; being the last of a class of cases of Blockade, appealed from the High Court of Admiralty, of which a list is prefixed to this number.

her

her to the port of destination. It has appeared in other cases, (a) that the blockading frigates do permit vessels to go within no great distance of the shore, for the purpose of procuring pilots; and the Court would not be disposed to draw the line closer than they have done, who are so much better acquainted with the facilities of slipping into the blockaded port, and with all the practical circumstances attending the navigation of that coast. If it had been a case, therefore, of situation merely, and *that* at the distance of about twenty miles from the port of *Havre*, it would be the duty, and the inclination of the Court, not to infer too rigorously from that circumstance alone an intention of violating the blockade. The master denies that he had entertained any such design, and states, "that he had come from the west, ignorant of the coast, and had stood off to avoid the danger of being thrown on a strange coast, and a coast of difficult approach, in the night, and that he was in quest of a pilot with a signal flying." If the situation of the vessel alone was to be considered, I should be disposed to acquiesce in this representation of his intentions, and to decree the vessel to be restored on payment of the captor's expences.

But there is an ulterior circumstance which presents a more unfavourable aspect. In the former case, the vessel had continued her course close under the batteries, and was cut out, at some considerable risk and danger to the blockading vessel. In that case there was an illegal intention pursued to an illegal act; for a neutral vessel cannot be permitted so far to interfere with the exercise of a blockade, as to expose the force maintaining it to the annoyance of the enemy's guns. In the present instance, the vessel was at the distance of near twenty

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(a) Christina
Charlotte,
supra.

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twenty miles ; but the unfavourable circumstance to which I allude, places her, in construction of law, in the same situation, which the other vessel had actually reached. For the master says, " that the course in which he was steering would have carried him directly to *Havre*, and that he should have continued in that course, though not into the port of *Havre* ; but that he should have gone close under the land, and have taken a pilot for *Caen*." Here, then, we perceive the same intention, and in the course of being pursued to the same illegal effect. How can this intention be considered as innocent ? It had not been carried so far as in the other case, I acknowledge ; but only because the vessel was interrupted before she had arrived at the spot, where the other ship was actually taken. It is impossible that any blockade can be maintained, if such a practice is allowed, that a vessel, under a destination to a port not interdicted, shall be at liberty to pursue her course in such a manner, as must draw the cruizer employed in that service under the range of the Enemy's batteries. It is at all times matter of regret, that the property of innocent persons should be exposed to hazard by the mere imprudence of their master ; but it is impossible to relax the principle, that the employer is legally affected by the acts of his agent. I am of opinion, that the master in this case had declared an unlawful purpose, and was employed in pursuing it to an unlawful act ; and that the ship and cargo must be pronounced subject to condemnation.

R E P O R T S
OF
C A S E S
DETERMINED IN THE
HIGH COURT OF ADMIRALTY,
Ct. Cr. Cr.

THE ELIZA AND KATY, CLAASBY.

*Oct. 29th and
Nov. 22d, 1805.*

THIS was a case of a ship under *American* colours with a cargo of sugar and coffee, 1000 pipe staves, and two bales of cotton, taken on a voyage from *Philadelphia* to *Rotterdam*. The vessel had been before brought in by the *Polecat* privateer, but had been restored by consent, and was proceeding on her voyage to *Rotterdam* with a sentence of restitution on board, when she was seized 23d *September*, 1805, by His Majesty's ship *Ariadne*, and brought to adjudication.

*Limitation of
Rule of ex-
cluding farther
proof from
fraud—in the
present transac-
tion; only.*

On the part of the captors, the King's Advocate and Arnold.—The evidence applying to the cargo is defective, and unworthy of credit. It is a cargo of colonial produce going to the port of an enemy, which had been transhipped, in a considerable proportion, at *Philadelphia*, according to the evidence of the boatswain, "out of a schooner just arrived from *Martinique*." These circumstances afford ground of enquiry as to the property, and also as to the continuity of the voyage. But the conduct of the master has been such as to strip the case of all support from his evidence, and

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there are papers on board, which more than sufficiently prove the owners themselves to be unworthy of credit. The credit of the master is impeached by his behaviour, at the time of seizure by the *Polecat*, and in the share which he has taken in the fraudulent concealment of papers. It appears that he had formed the design of resisting, or, as he himself expresses it, in a letter written by him on the 9th *September*, "if the wind had been favourable, we should have clapped a stopper round the arms and feet of his honor the prize master, and have carried him carefully to a *French* prison in *Holland*." His conduct in the present instance was also perfectly conformable to these declarations; since it is stated in the affidavit of Mr. *Lewis*, that he did not bring too until several shots had been fired, and that he afterwards declared, "that he would not have brought too if he had known that the boat of the *Ariadne* had only three rounds on board." It is admitted now by himself, that he was privy to the concealment of the most important papers, a circumstance which had not been known to the *Polecat*, when a consent to restitution was obtained. In consequence of the disclosure of this fact, the vessel was brought in a second time by the *Ariadne*, and it is now discovered that there had been a concerted scheme of fraud between the owners, the supercargo, and the master, and that the conduct of all the parties concerned in the management of this transaction was of the same nature. The owners put on board bills of lading, and other papers, prepared at *Philadelphia*, under the sanction of an oath, to represent the returned voyage as to be from *Teneriffe* to *New Orleans*, whereas the secret instructions to the supercargo disclose a return from *Teneriffe* to the *Havannah*. As to the supercargo, it is proved by letters found

found on board, that he had sent secret instructions to the master, to prepare him for his examination; and that he had been endeavouring to suborn a (a) false deposition from him, by persuading him to evade the questions put to him. Even the traces of the former history of the vessel, which have transpired, disclose a habit of a trade the most obnoxious, and unneutral. It appears from the evidence of the boatswain, "that the ship had sailed on her last voyage (as described in the 7th interrogatory), from *Philadelphia* to *Guadaloupe* with provisions, and had there taken on board seventy hogheads of sugar which she carried to *St. Bartholomew*. and from thence, with some few hogheads taken in there to *Philadelphia*; that they took in a cargo of gunpowder concealed in casks of bread, two barrels in each, that the whole was cleared out as provisions for *Dominique*; and on arriving between the isles of *Dominique* and *Guadaloupe*, they were hailed by an *English* frigate, who informed them that they must not proceed to *Guadaloupe* as that port was blockaded, and accordingly indorsed the papers of the ship, but the next morning the frigate being out of sight, they ran the ship into *Guadaloupe*, and there delivered the cargo." The whole circumstances of this transaction present a case of almost unparalleled misconduct imputable to all parties. When there has been a suppression of papers, and such behaviour, on the part of the master, as utterly to destroy the effect of the verification which he must be expected to give to his papers, it is impossible that the Court can restore; and when all the parties, even the

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(a) Letter dated *London* 4th *September*, 1805, from *J. White* to the master.

"If you should have commenced your examination in *Dover*, you will pay every attention to the following directions, the im-

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the owners (a) themselves stand so contaminated with the preparation of fraud for the returned voyage, it is not a case

portance of which, I hope, will be fully impressed on your mind; when they ask you, if there are any papers concealed on board, you must say, *no, there are none that concern the cargo in any way* but what have been given up. If this answer does not satisfy them, and they ask you the question a second time, you must say, *"that the papers that relate to the ship and cargo have all been fully given up; but that there are papers on board which do not relate to the cargo at all, which can be produced when they are called for."* But our secreted papers you must not give up, until you see or hear from me. The two answers above mentioned, you know, we can freely give upon oath, because you know very well the papers we have stowed away, do not relate in any one way to the present cargo, but merely to our conduct hereafter. I hope you will be circumspect in your proceedings, and not lose sight of the cargo, or the interest our owners have in the present trial."

Letter from *Dover*, 5th September, 1805, from the master, to Mr. James White.

"I this moment received your favour of the 4th instant, as to being examined here; I had made up my mind to refuse any interrogation in *Dover*. I was thinking if they examined here, to declare we have no more papers at all on board."

(a) Letter dated *London*, 13th September, 1805, from J. White, to Messrs. Rhoads and Perit.

"My examination has been so strict, that I was obliged to avow the papers concealed or be guilty of perjury: what effect they may have in the case remains yet to be determined, that these papers should be on board is extremely unfortunate, and is a circumstance that need not have been. My real instructions should have been verbal, and the letters and papers necessary to be used in *Teneriffe*, forwarded by the many opportunities that no doubt have offered since my departure, there to await my arrival. They were so well secured, that no person on earth could have discovered them, had I not been put to a test which no one possessing the principles of a Christian, or a man, could elude."

The Instructions here referred to were afterwards brought in by the agent in *London*, and contained a prepared scheme of fraud concerted by the owner for the misrepresentation of the returned voy-

a case in which the Court will think them entitled to an order for farther proof.

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On the part of the claimants, Laurence and Swabey.— It is unfortunate that in a case which so much abounds in imputations on the claimants, the captors also should have behaved in a manner that cannot fail to draw on them the reprehension of the Court. It appears that two of the seamen belonging to the *American* vessel had left the ship at *Dover*, when she was first brought in, and had entered on board the *Ariadne*(a), or another of His Majesty's ships. From these men the captors had obtained information of a suspicion of concealed papers not brought forward, but instead of disclosing it to the original captor, so as to give them the benefit of the discovery, it was kept back till restitution had passed, with a hope of obtaining condemnation to themselves. From one of these witnesses, the boatswain of the original crew, they have collected the charge made against the previous conduct of the vessel, which is in all respects irrelevant to the present question. But that witness was not on board the ship at the time of the capture, and ought not to have been examined. [Court. The captors ought certainly not to have produced them on the standing interrogatories without the special permission of the Court.] Another imputation against the captors is, that they

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age from *Teneriff*, as being to *New Orleans*, when in fact it was to be to the *Havannah*, with respect to which place the owner writes, "we had the satisfaction to see a few days since, our mutual friend Mr. Marten Madan, of *Havannah*, with whom we have entered into some important negotiations, which we have high expectations of resulting to mutual advantage."

(a) It was denied in *L. Lewis's* affidavit, that these men were hired on board the *Ariadne*.

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did not (a) bring in all the papers which were put into their possession, some of which would have cleared away very much of what has been imputed to the claimants. As to the reproach which has been thrown upon the credit of the master and supercargo, it is to be recollected that they were placed in circumstances of peculiar difficulty: They had been brought into this country just at the time when, in consequence of the many seizures that had been made of *American* vessels, a report had most *erroneously* been circulated, especially among the *Americans*, "that an Order of Council had passed directing the bringing in of all *American* vessels bound to *Holland* with sugar and coffee." We find that the master had been strongly impressed with this mistaken notion, from the account that he gave of it in one of his letters to his owner; and though it is certain that the report was without foundation, it cannot be matter of surprise, if persons impressed with such a belief were betrayed into some irregularities, with a view of guarding against a measure, which if it had actually existed, would almost have justified any conduct that could be resorted to for protection. With this view some directions were given by the supercargo, and apparently adopted by the master, which certainly cannot be defended. But as far as their credit is to be affected by them, it is but justice to observe, that the passages relied on bear an honourable testimony to the veracity of their assertions, when solemnly called to their examination on oath. The letters which refer in a confidential manner to the concealed papers, describe them, at the same time, as papers not in the least degree connected with the present voyage. They are sworn to be

(a) A monition had been directed against the prize master to bring in all papers, &c.

instructions

instructions for a future voyage, after the vessel had reached *Holland*, and in that light they can in no manner affect the evidence of the present case. As little can the Court advert to what is said to have been the conduct of the vessel on a former voyage. There is nothing to throw any reasonable doubt on the property, or on the legality of the present voyage, except in the evidence of the boatswain and the other mariners, who are witnesses to whom but little attention is due. It is submitted therefore that the Court will see no reason to delay the restitution of the ship and cargo, which have been so unjustly harassed by the vexatious conduct of the captors.

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In Reply. The King's Advocate contended.—That there had been no instance in which the Court had restored without further proof, when the master had been guilty of a suppression of papers, and prayed that the Court would at least order further proof of the property.

JUDGMENT.

Sir *W. Scott*—I am of opinion that the case is ripe for decision, and that there is no necessity for requiring further proof. It is the case of a ship under *American* colours, laden with *West India* produce taken in at *St. Bartholomew* and *Philadelphia*, and coming to *Rotterdam*. She was first seized by a privateer and released, and was afterwards taken by the present captors. Certainly to seize a vessel which has already been released, and is sailing with a copy of her restitution on board, is a measure to be practised with great circumspection. There may however be circumstances that will justify such an act; but it behoves the second captors to see that they are furnished with such, as will supply a sufficient apology. In the present case, there are circumstances

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which do, I think, fully justify the captors, though, whether they will enure to produce a condemnation, may depend on other principles.

Upon the question of property, there is no foundation for any particular suspicion. All the evidence points to the claimants as the proprietors, and I have heard no suggestion of any individual, to whom the property is assigned, except by the general surmise, that it may belong to persons at *Rotterdam*, to which place it was bound. In the papers which disclose the most disgusting preparations of fraud, I see much to reprehend; but as to any other proprietors of this present cargo than those for whom it is claimed, I see nothing that can be taken to indicate any such. Unless I could go to the length of holding, that persons detected in the meditation of fraud, not for this voyage, but for some future transaction, are totally incapacitated from obtaining any credit, with regard to the present transaction, and that such a discovery is sufficient to blow up every case in which they are concerned, there is no ground on which I could pronounce a sentence of condemnation. I do not conceive that to be a wholesome rule, on which this Court can venture to proceed. That the parties have discredited themselves, with respect to some future transaction, is not sufficient. If the evidence had appeared doubtful on any question fairly before the Court, enough is disclosed in the conduct of these parties to convince me, that they are not persons to whom an order for farther proof should be entrusted. But no such ground is laid, and I cannot conjure up such a case on the mere suggestions of the imagination, founding themselves only on indications of a disposition to fraud.

The instructions given by Mr. *White* the supercargo to the master are unquestionably highly disreputable,

putable; and there are strong proofs of concerted fraud, as to the ulterior voyage, on the part of the persons for whom the claim is given, but no objection has been raised against the present transaction, except as to the continuous voyage; on which, it is said, "that some parts of the cargo had been recently brought from *Martinique*, and that they were immediately transhipped, and put on board this vessel." But that objection is answered by a paper on board, which shews those sugars to have been purchased by the claimant at *St. Bartholomew*; and considering the quarter from which the imputation comes, I think there is enough to satisfy the demands of the Court, which is not desirous of extending its enquiry on questions of this kind on slight grounds. I have no hesitation therefore in pronouncing the restitution of the ship and cargo.

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The only remaining question is, as to costs, which are very much within the sound discretion of the Court, with reference to all the circumstances, that may be fairly collected respecting the conduct of the parties. When I see that every person of any station of authority regarding this ship and cargo, the master, the supercargo, and the owners, are implicated in the same intention of concerting fraud against the belligerent rights of this country, and that the measures adopted for that purpose have been the cause of bringing this case a second time to adjudication, I think, it is a case, that justifies me in holding out this wholesome lesson to neutrals, that persons conducting themselves in such a manner, shall be made subject to the payment of costs. Something has been said of the affidavit of the prize-master, to which, I understand, a sufficient answer can be given. If he exonerates himself

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from the imputation of withholding the papers now given up, I shall consider the captors to be entitled to their full costs in this case.

Restored.

THE FALCON, ATKINS.

Nov. 1st,
1805.

Defective Con-
demnation, by
Consular Courts,
how supplied,
by sentence of
the Court of
appeal at Paris.

THIS was a case on the claim of the *British* proprietor of a vessel, which had been captured by the *French*, 2d June, 1803, and condemned in a *French* Consular Court at *Leghorn*, and sold under the authority of that sentence to a Mr. *Styles*, the *American* Consul in *France*. The vessel, after that conversion, was condemned on a rehearing, in the nature of an appeal, in the "*Conseil des Prises at Paris*, 26 March, 1805. It appeared that the first purchaser under the sentence of the Consular Court, had taken the vessel to *New Orleans*, and had returned with her to *Bordeaux*, Dec. 1804, when she was transferred to Mr. *D—*, and by him to Mr. *Lovel*, on behalf of his brother the present proprietor, a person resident in *America*.

On the part of the Captors, the King's Advocate observed—That the captors' case was confined chiefly to the claim as asserted on the part of Mr. *Lovel*—and contended that, if the property of the vessel was vested in him, there were letters on board which shewed that he was not entitled to be considered as a citizen of *America*; since he appeared by his own expressions to have repented of having settled in *America*, and to have projected a change of residence, with a view of employing himself personally as a trader between *New Orleans* and *Bordeaux*.

On

On the part of the British Owners, Arnold.—The original proceedings in the Court at *Leghorn* must be admitted to be invalid. It will appear from the contents of the paper, now exhibited, that the process before the Conseil des Prises, which is supposed to have remedied the defect of the original sentence, can have no such effect. The ship and cargo were condemned at *Leghorn*, and an appeal was lodged as to the cargo, but no appeal was entered as to the ship; neither does there appear to have been any Writ of Evocation, as it is called, from the Conseil des Prises, to draw the original question as to the ship before that Court. The proceedings were conducted throughout as *upon appeal*, in which the effect of the sentence of the Superior Court must be limited to the question appealed. The case went entirely upon the cargo; and the report of the officer of the Court details very explicitly the nature of those proceedings. It states, “that the Conseil des Prises has rendered the following decision between the captain of the privateer and the claimants of the cargo.” The cargo alone is mentioned. The expressions used in the process seem to imply that the sentence at *Leghorn*, as to the ship, was properly given, according to the principles held in *France*, respecting prize jurisdiction, and that it was not a subject for the consideration of the Conseil des Prises. Since the person drawing up the official report, observes, “in acknowledging that the commissary was competent to pronounce upon the validity of the seizure of the vessel, on account of her quality of enemy, I observe that he should have abstained from pronouncing upon the cargo as soon as there was a claim for the same.” Then the Conseil proceeds to pronounce a sentence
of

The
FALCON.

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The
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1805.

of condemnation against the *ship*, (a) though there was no appeal on that part of the consular sentence before the Court. This was evidently an excess of jurisdiction. The instrument in its title purports to relate to the cargo only, and it is not the accidental and informal introduction of the ship in the sentence, that can be taken to operate as a regular and competent sentence of condemnation. A further ground of defect is, that even if there was no objection to the exercise of the jurisdiction of the Court, as founded on the manner of proceeding; still the ship which was the subject of this sentence was, at the time, not amenable to the jurisdiction of the Court. The vessel had been sold, and was lying in the port of *Bourdeaux*, after having performed her first voyage, in the character of an *American* ship, under *American* colours, and with an *American* pass on board. It is still undetermined (b) before the Court of Appeal, in the *Henric and Maria, Baar*, whether it is not essential to a valid condemnation, that there should be a sentence of a competent Court sitting within the country of the Enemy, and pronounced on the subject matter situated within the jurisdiction of that country. In this case, it cannot be said that the ship was subject to the territorial jurisdiction of the Court, at the time, though lying at *Bourdeaux*. Whatever might be the effect of the sentence of the Conseil des Prises, in other cases, it can have no operation on a title which was conveyed away from the *French* captor, before any valid condemnation had passed.

(b) Since determined, *supra*
page 138.

• (a) "The Council without attending to the decision of the Commissary General of Commercial Relations at *Leghorn*, 30th *Thermidor*, 11th year, declare good and valid the prize, and adjudge the said ship the *Falcon*, together with her freight that might be due to the *English* Captain, to the captor."

On the part of the neutral purchaser, Laurence argued, to the effect of the observations stated in the judgment as the ground of the sentence—and which it is therefore needless to report in detail.

The
FALCON.

Nov. 12,
1803.

JUDGMENT.

Sir *W. Scott*.—This question has arisen on the capture of a ship which was originally a *British* vessel, captured by the enemy on the 2d June 1803, and taken to *Leghorn*, where some proceedings were had before the *French* Consul, which this Court, under the decisions which have passed here, and in the Court of Appeal, would certainly not sustain. It appears that the vessel was transferred under the authority of a sentence so obtained to a Mr. *Styles*, and by him derived to the present claimant. Some objection is taken to the national character of the claimant; but a preliminary point is offered to consideration, whether the documents, which are now produced as farther proof in his behalf by Mr. *Lovel*, the brother resident in *Bordeaux*, can be admitted?—He is, it seems, invested with the character of the *American* Consul at *Bordeaux*; and certain it is, that an *American* Consul resident in *France* is subject to all the disabilities of a *French* merchant, as to the power of becoming a claimant in this Court; but he is not, on that account necessarily disabled from introducing evidence before the Court, for the alien enemy is not generally disabled as a witness, and the cases of exception are few. Mr. *L.* is in this country at the present time; and if the documents which are offered to be produced from him on behalf of his brother are in substance satisfactory, I should be sorry to send this case across the *Atlantic*, to have the same proof returned immediately from the claimant himself. I

am

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FALCON.

Nov. 18,
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am not disposed therefore to sustain the objection to the competency of this Gentleman; and I am as little disposed to sustain the objection to the national character of the claimant himself; because the mere *intention* to settle in *France*, as a *French* merchant, cannot be held to clothe him intermediately with the french character, and to deprive him of the right of being considered at the present time as an *American* merchant.

I shall therefore dismiss these objections, and proceed to what is the main question in the case, the validity of the title of condemnation under which the property has been acquired. The fact that the ship had been a *British* prize did not appear in the original evidence; but it is now disclosed on farther proof, that she had been carried into *Leghorn*, where the *French* Consul assumed a jurisdiction, and passed a sentence of condemnation on the ship and cargo. If the matter had rested there, on the validity of the consular sentence at *Leghorn*, this Court, under its former decisions, which have been affirmed in the superior Court, would not have held that title to be sufficient. But there has been also a sentence of the Conseil des Prises at *Paris*. Every body knows that the state of the *French* Prize Courts has been, as it is described here, extremely vacillating during the turbulent times, of which we have had the misfortune to be witnesses. From the papers that have been introduced, we may collect that the Conseil des Prises at *Paris*, as now constituted, is a Court of original jurisdiction, and also a Court of Appeal. It exercises a power of evocation, by which it can call before it causes from the inferior Courts, which appear to exercise but a very limited jurisdiction. From the sentence in the

consular Court at *Leghorn*, there was an appeal on the part of the claimant of the cargo to the Court at *Paris*; and the sentence of that Court describes the proceedings to have been "between the claimant of the cargo and the captor." It is in argument attempted to be inferred from hence, that there has been a total defect of authority over the vessel, in that Court, because it was not made a part of the appeal, and was, as it is now contended, improperly included in the sentence, when there were no parties sustaining that interest before the Court. But I am to recollect who the persons are from whom the objection comes. They are *British* subjects, who could have no *persona standi* there, and could not have been parties to the proceedings either in the Court of *Leghorn*, or *Paris*, without stating themselves out of Court. It was impossible that the proceedings could be otherwise conducted; and, therefore, I cannot think that the absence of the parties, which is urged as a fundamental defect, is material in such a case. It is nothing more than what takes place here in cases of common condemnations, which do not rest solely on the effect of the monition, but pass on a view of the evidence of the case. The enemy proprietor is necessarily absent by operation of law, and yet the sentence is completely valid, as well against him as against all the world.

It is said, that the Court at *Leghorn* is admitted in the report of the proceedings at *Paris*, to have had competent jurisdiction over the ship, and therefore that it did not properly come before the Conseil des Prises, to have passed a sentence upon it. The expression of the officer of the Court who drew up the report, does not, I think,

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FALCON.

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The
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(a) *Supra* page
195.

(b) See reasons as
noticed *supra*
page 30.

think, amount to more than a statement of his opinion—The expression in the original (a) is not more than hypothetical. Leaving that out of the question, what is the inference that we must draw from the course of the proceedings at *Paris*? The case goes on upon the evidence of all the papers, relative to the capture, and finally that Court pronounces a sentence of condemnation *on the ship*, and a sentence of restitution (b) of the cargo. It must be inferred, I think, from this instrument, that the Court below had exceeded its jurisdiction; that the superior Court was competent to entertain the question, and that it did proceed regularly and properly, as well upon the ship, as upon the cargo.

But another objection has been raised, which it is also necessary to consider: It is said, that the claimant having purchased under the original sentence, cannot cure the defect of that title by a subsequent sentence, passed after many changes of property, and when the vessel herself was no longer amenable, as a subject of prize proceedings, to the jurisdiction of the belligerent country. I cannot accede to that position. In our own Courts it happens unavoidably, as to ships taken in the *East Indies*, that long before the case comes to adjudication, the property may have passed to other hands. If the title is impeached before the sentence takes place, it may be vitiated; but when a valid sentence comes, it must be considered, as operating retroactively, so as to rehabilitate the former title. In this case a valid sentence has confirmed the title, before any objection had been taken to it, and that title derived from the original purchaser has been properly conveyed to the neutral claimant. I shall therefore direct this vessel to be restored to him.

THE MARIA, MONSES, Master.

Nov. 20th,
1805.

THIS was a case on the blockade of the *Wefer*, relating to a cargo which had been sent from *Bremen* in lighters to the *Jade*, for the purpose of being shipped for *America*, under a charterparty made at *Bremen*. The vessel had gone from the *Wefer* to the *Jade* in ballast, and having taken on board the cargo, sailed from thence on the 12th *August*, 1805, and was captured in the *North Sea*, 15th *August*.

Blockade.
Goods shipped in the *Jade* having been previously sent in lighters from the blockaded port, and under charterparty, with the Ship proceeding also from the blockaded port in ballast to take them on board. Penalty relieved in this instance by (special relaxation as to the trade of *Bremen*, &c.

On the part of the captors, the King's Advocate and Laurence contended—That the cargo had been exported from *Bremen* on the present voyage in violation of the blockade of the *Wefer*; that although some relaxation had been granted to the private coasting trade of that River, it could not be construed to extend to the permission of foreign trade, which would in fact frustrate and defeat the whole object of the blockade.

On the part of the claimants, Arnold and Robinson. Argued upon the nature of the blockade, which had been imposed, rather with a view of counteracting the effects of the possession, which the enemy had assumed of the banks of the *Wefer*, than with any intention of restraining the commerce of *Bremen*; and contended, that under the equitable construction which the Court would be inclined to adopt, the circumstances of this transaction could not be held to contravene the terms of the relaxation that had been allowed. The goods had passed in lighters, as they

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were permitted to pass. And when they had thus been cleared from the restriction of the blockaded port, it was not within the scope of the operations of blockade to consider what might be the ulterior destination. A case in some degree analogous to the present had happened, during the late war, relative to the blockade of *Amsterdam*. Goods had been ordered at *Amsterdam*, and forwarded as part of the foreign commerce of that place, by an interior communication to *Rotterdam*, where they were put on board the ship; but the Court was disposed to consider the moment of their connection with the ship as the commencement of their outward voyage, and accordingly restored the cargo, as not coming within the description of goods exported from *Amsterdam* in violation of the blockade of that port, [2 Adm. Rep. p. 116.] By parity of reasoning, the goods in this instance had come from *Bremen*, in a mode not inconsistent with the permission which had been granted. They were not obstructed on that passage by the blockading force, but were seized in an ulterior part of their voyage, by a vessel in no manner connected with the blockading service. A reference was then made to the permission lately granted to the merchants of *Bremen*, to carry on a communication with the *Jade*, and it was contended that the terms (a) of the permission taken in conjunction with the terms in which the petition was framed, amounted to a relaxation of this extent, and for the purposes of *Foreign* commerce.

(a) As the import of the terms of the petition is particularly noticed in the judgment, this part of the argument is not extended.

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JUDGMENT.

Sir William Scott.—This ship was taken on a voyage from *Varel* to *America*, having on board a cargo that had been sent from the *Wefer* to the *Jade* in lighters, and there transhipped. And it is contended that this being the carrying of goods sent expressly from *Bremen*, for the purpose of being exported, *in the course of the foreign commerce of that port*, would be a violation of the blockade which has been imposed on the river *Wefer*. I have had frequent occasion to observe how severely the neutral cities connected with the *Wefer* and the *Elbe* are pressed upon by the blockade of those Rivers. At the same time it is my duty to apply to those operations of blockade, the principles that belong to that branch of the law of nations generally, and by which only such measures can be maintained. The principles themselves cannot differ; although it will undoubtedly be the disposition of the Court to alleviate the situations of those towns as much as possible, by attending to any distinctions that can be advanced in their favour, not inconsistent with the sound construction of the general principles of law. A blockade imposed on the *Wefer* must in its nature be held to affect the commerce of *Bremen*; because if the commerce of all the towns situated on that River is allowed, it would be only to say, in more indirect language, that the blockade itself did not exist. It cannot be doubted then on general principles, that these goods would be subject to condemnation, as having been conveyed through the *Wefer*; and whether that was effected in large vessels or in small, would be perfectly insignificant. That they were brought through the mouth of the blockaded River, for the purpose of being shipped for exportation,

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would subject them to be considered as taken on a continued voyage, and as liable to all the same principles that are applied to a direct voyage, of which the *terminus a quo*, and the *terminus ad quem* are precisely the same, as those of the more circuitous destination. The case which has been referred to, is, in this respect, very different, because there the communication had been by inland navigation, which was in no manner, and in no part of it, subject to the blockade. If therefore nothing had passed between the Government of this Country and the City of *Bremen*, it appears to me that these goods would be subject to condemnation (a), and that I should be unable to distinguish the port of *Bremen* from any other place liable to the general operations of a blockade.

But a communication has passed on this subject between the Government of this Country and the city of *Bremen*, which may be of a nature to furnish the rule, that is to govern this particular case, and to supersede the general principle of law. It is proper therefore that the result of that negotiation should be carefully examined, that we may judge what was asked, and what was conceded. I confess it does appear to me that the passages which have been cited in their natural sense apply to the external commerce. The object of the application is stated to be, "to prevent the remaining commerce from being transferred to the city of *Embsen*." What commerce must we suppose to be meant? not merely the little commerce of

(a) On this principle. In the *Charlotte Sophia*, Möller, ship and cargo condemned, 20th November 1806. Voyage from *Tonningen* to *Algeiras*, with goods shipped at *Tonningen*, but having been sent in lighters from *Hamburg*, under charter-party, with the ship, proceeding also in ballast from *Hamburg*, that they should be so shipped for *Spain*, &c.

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Varel, but the remaining portion of the maritime commerce of *Bremen*. Again it is represented, "that the land carriage between *Bremen* and *Varel* is impracticable; that *English* vessels consigned to *Bremen*, had arrived in the *Jade* under *convoy*." These terms seem to have pointed out to the notice of the Statesman to whom they were addressed, that the object of the petitioners was to obtain permission, that the importation and exportation of the foreign commerce of the city of *Bremen* might be carried on in this manner. The letter then states, "that the River *Jade* was not safe, that there were not sufficient warehouses to store the goods, and that it was necessary that they should be forwarded as expeditiously as possible to *Bremen*." These are certainly expressions which very much repel the more limited interpretation to which the permission considered separately, and by itself, might be liable. There is another passage also of material importance, which states, "that these lighters are too small and too slight to venture into the open sea, that they can only coast along the shore; that they proceed direct from *Bremen* to *Varel* without resorting to or touching at the country occupied by the *French*, so that *no abuse being possible* to be made of these vessels or barks, the city of *Bremen* is the more induced to hope, &c. &c." From this representation it appears to me, that the two abuses proposed to the *British* Government as not likely to occur, are the direct communication with *Bremen* by ships from sea, and the touching on the parts of the coast occupied by the *French*. These consequences, they say, could not happen; and that representation is material I think in fixing the interpretation of that admonition against abuse, which is contained in the answer of the *British* Government; which

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informs them, " that due attention has been paid to the request signified to Lord *Harrowby* in several notes from Mr. G. on the part of the town of *Bremen*, that lighters might be allowed to navigate between the Rivers *Jade* and *Wefer*. That orders had been given to His Majesty's ships employed in the blockade of the latter, to permit the passage of lighters (really coming within that description, and laden with innocent and neutral cargoes) to pass and repass over the shallows between *Varel* and *Bremen*. *That His Majesty trusts that care will be taken that this permission may not be abused or any advantage taken, which would compel him to revert to all the strictness of the blockade.*"

When I see that the permission was asked without any qualification whatever, and that nothing is said in the answer that lays any restriction on the foreign commerce of *Bremen*, but only provides against abuses, which must be understood to mean those stated in the application, I am of opinion that the merchants of *Bremen* are justified in the interpretation which they have put on this indulgence. How far it may affect the general purposes of the blockade it is not for me to consider. It might perhaps appear, that the object of the blockade would be almost entirely frustrated by such concession. If it should be found to do so, the mischief must be remedied by supplementary provisions. But when I look to the communication, in which the thing is asked in terms which manifestly point to this kind of trade, and the answer appears to grant the permission in the terms of the petition, I am of opinion that the claimants were justified in the particular trade which they have been carrying on, and that they are entitled to the restitution of this property, on payment of the captors expences,

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(Instance Court.)

VANGUARD, PINCE Master.

THIS was a case on petition for the recovery of wages and the privilege of three slaves, alleged to be due to *W. Taylor*, for his services on board the vessel in the capacity of mate during a voyage from *Liverpool* to the *West Indies*, and back to *Liverpool*, under contract of the 2d September, 1802,

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1805.
Suit for wages
—ex turpi Con-
tractu not
sustained—Vio-
lation of Slave
trade Acts, &c.

On the part of the owners, *Swabey*.— Contended that the nature of the contract under which the wages are alleged to be due, was in violation of the several Acts of Parliament passed for the regulation of the Slave Trade (a). The petition (b) states that

(a) 30 G. 3.
c. 33, and sup-
mer Acts.

(b) "That it was farther agreed between him the said *John Pince*, and the said *William Taylor*, that he the said *William Taylor* should act as the *offensible* master of the said ship *Vanguard*, in the clearing her out from the said port of *Liverpool*, and until she should sail therefrom, when he the said *John Pince*, the real master, was to take the command of the said ship, and for such additional service it was agreed on the part of the said *John Pince*, the master, that he would pay the said *William Taylor*, the sum of 50*l.* exclusive of what was agreed as aforesaid to be paid him for his service as mate on board the said ship. That the said *William Taylor* in or about the beginning of the said month of *September*, 1802, *offensibly* assumed the command of the said ship as the master thereof, and cleared her out as such, and continued to act in the pretended capacity of master of her, until on or about the 15th day of the month of *October* following, when the said ship sailed from *Liverpool*, on her said intended voyage, and for the performance of such service he duly received the said sum of fifty pounds so as aforesaid agreed to be paid him for the same, and that the said *William Tay-*

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this person hired himself to serve as mate, and also as ostensible master during the outfit of the vessel. Whereas the law requires the real master of a slave vessel to be acting in his own character, to take upon him the several obligations imposed by the Slave Acts, under the sanction of an oath. This person, in contravention of all those salutary provisions, must have taken a false oath as master, though he was really the mate of the vessel; he cannot therefore be permitted to set up a service under such a contract, in violation of an Act of Parliament, as the foundation of any claim in a Court of Law.

In support of the petition, Adams argued—That there was no clause in the act which expressly prohibited the use of clearances of this description; and that it was no part of the present suit to recover the money due for that extra service. That the mate alleged a hiring and service as mate, and had made out a case, which at least entitled the petition to be admitted. That if he had been guilty of any misconduct in respect to his employment as master, it was not an objection to be set up on the part of the owner, for whose benefit and convenience only such an irregularity could have been committed.

In Reply, Swabey observed.—That though the Act of Parliament did not specifically prohibit the artifice

for whilst acting as the pretended master of the said ship for the purpose aforesaid, did sign the usual ship's articles or mariner's contract as master thereof, although he was only ostensibly such, and was in the truth and fact only chief mate of the said ship."

or

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or fraud which had been committed in this case, it contained provisions, (a) which rendered it impossible, that the mate could have acted as he alleges himself to have done, without being guilty of perjury, and without being a party to the fraudulent contravention of the law,

JUDGMENT.

Sir *W. Scott*—It is the clear duty of the Court to enforce the provisions which the wisdom and humanity of the legislature have made for the regulation of this

(a) By 30 Geo. 3. c. 33. the 7th clause of the act, it is enacted, That from and after the first day of *August* 1790, it shall not be lawful for any person to become a master, or take or have the command or charge of any such ship or vessel, at the time he shall clear out from any port of *Great Britain*, for purchasing and carrying slaves from the coast of *Africa*, unless such master or person taking or having the charge or command of any such ship or vessel, shall have made oath, and delivered in to the collector or other chief officer of the customs, at the port where such ship or vessel shall clear out, a certificate, attested by the respective owner or owners, that he has already served in such capacity during one voyage, or shall have served as chief mate or surgeon during the whole of two voyages, or either as chief or other mate during three voyages, in purchasing and carrying slaves from the coast of *Africa*, under pain that such master or other person, taking or having the charge or command of any such ship or vessel, and also the owner or owners who shall hire or employ such person, shall, for every such offence respectively, forfeit and pay the sum of £500.

* And by the 14th clause, "before any ship or vessel proceeds to sea, the master, officers, and marines, shall sign and execute articles of agreement, and a muster roll, in the presence of, and witnessed by the clearing officer, and one of the tidemen of the port from whence the ship departs; and duplicate of the articles of agreement and muster roll, duly signed and executed, shall be delivered to the aforesaid clearing officer, in order to its being lodged with the proper officer in the Custom House, according to the forms hereunto annexed," &c.

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trade. In any petition for wages founded on services in this species of commerce, I shall think it my duty to look very particularly to the enactments of those Statutes, in which particular duties are imposed upon the parties engaged in conducting it. It is perfectly obvious that all the laudable intentions of the legislature may be frustrated with impunity, if an ostensible master can be set up, to serve any private purpose subsisting between the real master and the owners of the vessel. It is by no means a sufficient answer to this objection to say, that it comes with a very bad grace from the owner himself, with whom this illegal transaction may be supposed to have originated. It is the duty of the Court *ex officio* not to shut its eyes against any criminal act appearing in the face of the petition, in the very terms in which it is pleaded, viz. "that Taylor acted as mate, and that it was agreed that the ship should be cleared out under William Taylor as ostensible master, and that after the vessel was cleared out Pince should take the command, and that for such services Taylor was to receive so much." No explanation is offered; and the Court is led to presume that what has been so done, has been done for the purpose of defrauding the law. I will not absolutely, at this moment, reject the petition; I will give the party an opportunity of offering his explanation, but I shall certainly expect it to be such as will show an innocent purpose, and steer clear of any purpose to elude the provisions of the law.

Dec. 11th.

On a subsequent day this cause came on again, when an additional article was pleaded, stating, "that Taylor had so acted as ostensible master at the request of the owner, and of Pince the real master, for the purpose of obtaining a crew, since Pince's character for cruelty was so well known that he

he would not have been able to have procured men. That the parties were not apprized that he was acting in violation of any law."

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1895.

Judgment resumed.—When this summary petition came before the Court on a former day it was pleaded, "that *W. Taylor* had been hired to act as mate, but that he entered into a farther agreement, that he should also act as ostensible master for various purposes in the clearing out of the vessel." An objection was then taken, that such an agreement was repugnant to the provisions of the Act of Parliament (a), that it was therefore a *turpis contractus*, which would defeat any application to obtain the aid of a Court of Justice to carry it into effect. The Court gave the party an opportunity of explaining the circumstances which had led to this proceeding, in order to shew that he had entered into the agreement from an innocent motive, and without the design of producing any mischievous effect. It is now stated, "that he entered into the agreement, because *Pince* was a man of such a cruel character, that he would not have been able to procure men, and that the mate was not aware of the provisions of the Act of Parliament." Ignorance of the law cannot be averred as a justification in any case, more particularly with regard to the acts in question, which contain particular provisions for making the law on this subject familiarly known, by sticking them up in a conspicuous part of the ship (b).

That

(b) "That the master, &c. of every such ship or vessel shall cause a printed abstract of this act, and also a copy of the schedule (A.) and of the muster roll, respectively annexed to this act, to be hung

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That this agreement is a contravention of the Act of Parliament cannot be denied; neither can it be disputed that if such a practice was continued, the whole effect of the regulation would be defeated. It is not for me sitting here to reprehend the policy or the morality of a trade which is continued to be permitted by law; but it is certainly my duty to keep as rigidly as possible to the letter of those provisions, which the wisdom of the legislature has framed, by way of salutary controul over the manner, in which it is to be conducted.

Then if this is a contract in violation of the Act of Parliament, what will be the consequence? That the contracting parties are in *pari delicto*; that one is not at liberty to set it up against the other, and to allege that he was induced by the other to enter into such an illegal contract. It is as much the duty of the one not to yield to temptation, as it is of the other not to propose an illegal temptation. In such a Case, the law refuses to interpose between them, and leaves them to avail themselves of their dishonest engagements as they can. As to the reason advanced, "that the real master was notoriously of so cruel a disposition, that he could not obtain men"—Is not that a fraud upon every man that entered on board the ship? If the master was a person under whom no one would voluntarily ship himself, was it not a gross act of fraud to entrap men into a situation of connection with, and subordination to, such a person.

hung up and affixed to the most public place of such ship or vessel, and shall cause the same to be constantly kept and renewed, so that at all times they may be accessible to the officers and seamen on board such ship or vessel, under penalty of £.20."—
30 Geo.3. c.33. § 19.

act

When I recollect that the whole purpose of the act was to guard against cruelty, and against habits of ferocious disposition, to be exercised upon the persons subjected to his command, and when I see that the effect of this contrivance has been to entrust a person with the management of this kind of commerce, whom the policy of the law would have excluded, I cannot but consider it as a very gross case. Both the parties are equally guilty of fraud, upon every person who entered on board the ship, as well as upon the general policy of the law. It is said that to reject this demand cannot affect the continuance of such a practice—I am of a different opinion. The practice will not be carried on unless instruments can be procured; and I trust it will be some discouragement, that parties should know, that they will not be permitted to resort to the assistance of the law to enforce their demands under such agreements. On every ground, I am of opinion, that the petition is inadmissible, and that the explanation offered, instead of affording any excuse, is an aggravation of the offence.

It being represented that the mate had not only lost all his wages, but that he had been obliged to find his way home from the coast of *Africa*, and, the owner having been equally guilty, the Court gave no costs.

THE FREDERICK AND MARY ANN,
ANDRIESEN, Master.

Nov. 26th,
1805.

THIS was a case, on the claim of the ship's company of the *Ceres* privateer to share in salvage decreed to be paid on the re-capture of some *British* property on board this vessel, effected by *Barnaby Vick* and eight others of the crew of the *Ceres*, from on board a prize belonging to the privateer, which the said *Vick* was conducting into port in the capacity of prize master.

Interests of mariners, separated from their ships, as prize masters, on board captured vessels, to share with the ship's crew, and vice versa, of the ship's crew to share in prize interests, acquired by them.

On

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On the part of the privateer the King's Advocate stated—That the *Frederick* and *Mary Ann* was a *Dutch* vessel which had been captured by an *English* privateer, and was afterwards re-taken by the *French*, and was finally re-captured by the prize master of the *Prince*, who was conducting the *Prince*, a prize belonging to the *Ceres* privateer, into port. Some part of the prize had been condemned as *droits*, as *Dutch* property taken by a non-commissioned captor, and other parts had been restored to the *British* proprietors on salvage. The present claim is instituted on the part of the ship's company of the privateer, to share in the interests of salvage accruing on the re-capture, and that not only on general principles of equity, but also under the express agreement of the ship's articles, in which it is provided, "that any of the crew who should be put on board a prize, and taken prisoners, should share in prizes made by the privateer during their absence." This article necessarily implies a reciprocal right, on the part of the crew, to share in any prize interests that may be acquired by such persons in the course of their separate employment.

On the other side Laurence.—The circumstances of this case present as gallant an action, as perhaps ever came to the view of the Court. This person was put on board the *Prince* to conduct her into port. In the course of his voyage he fell in with a vessel which appeared to be an *English* vessel in the hands of the *French*. The prize master went out in his jolly boat to reconnoitre, and having approached under the disguise of a *French* uniform, and in the character of a *French* officer, he boarded the vessel, and overpowered the *French* crew, and succeeded in effecting

effecting the re-capture of a very valuable property. It was an act of mere personal gallantry, independent of his duty to the privateer, and not within any engagements of reciprocity arising from the agreement, which has been mentioned in the ship's articles. The meaning of that article was evidently to prevent any unjust preference in selecting men for different services, and to obviate any objection against being sent, in an unprotected state, on board an enemy's ship, under a risk of being re-taken by the enemy and carried to prison. With that view it secures an interest in future captures, to prize masters and persons put on board the enemy's ship, notwithstanding they should be carried prisoners into the enemy's port. The equivalent for the chance of sharing in future captures, is the service on board the prize vessel, and the risk of personal danger. It is not necessary that there should be farther reciprocity inferred to divide with the privateer the fruits of any enterprize on their part, so entirely depending on their personal address and gallantry, and so foreign to the contemplation of the parties in drawing up the ship's articles. Any re-capture that had been made by the privateer might have been effected without danger or loss. On the contrary, this attempt was hazardous in the extreme, and if the persons who partook in this enterprize had been overpowered and sent to prison, the transaction might have been considered as out of the ship's articles, and so far unjustifiable, as to have defeated any claim that had been set up on their behalf under them. To consider the privateer therefore as entitled to share in the fruits of these extraordinary exertions, on the grounds of reciprocity, would be to establish a sort of iniquitous equity, where the risks of the parties

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were not equivalent, and in which no real equity can be discerned.

In Reply, the King's Advocate.—It is perhaps well that this case has arisen, since there is now depending for the consideration of Government a case of considerable magnitude, and of a similar nature, respecting an interest in a capture made by the prize master of the *Victory*, who had been put on board a vessel captured by that ship. The question in that case is, whether the crew of the *Victory* should share in the interests resulting from that capture, which may be derived from the bounty of Government. It appeared to me that they should share, according to what I have understood to be the practice of the navy. In this instance the general equity, is farther confirmed by an agreement, which contracts for a right to share “in any thing that should be made during the cruise.” The terms of the article would extend to head-money, or to any interest acquired by the most active exertion, and with the greatest personal danger; and therefore the argument attempted to be drawn from the nature of the enterprize, and the danger attending it, leads to no conclusion against the claim of the privateer, which might have been exposed to as great danger, and yet have been compelled, under the contract, to divide the prize with the six or seven men on board the *Prince*, who might be all the time lying in port. A more special consideration also arises from the danger to which the property entrusted to their care was exposed; an insurance had been effected on that prize which might have been vitiated by this act, as a wilful and unjustifiable deviation; If the attempt had failed, and the prize master had been repulsed, the consequences

quences might have been fatal to the property in the *Prince*, which might in turn have been re-captured by the *French* crew,

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JUDGMENT.

Sir *W. Scott*.—The facts of this case are generally admitted, and stand without controversy between the parties. It appears that the *Ceres* privateer, having a crew of 100 men had re-captured an *English* vessel, the *Prince*, and had put a prize master and eight men on board, with orders to make *Jersey* or any port of *England*. In proceeding on that course, they descried another vessel, which they considered, from her appearance, to be a prize in the possession of the *French*, and concerted a plan of re-capture with so happy a mixture of address and gallantry, that what seemed an enterprize of apparent danger, was accomplished without any loss. To all expressions of eulogium on the merit of these individuals I readily assent. But the question is, whether they are entitled to take the whole benefit to themselves. I have always understood it to be the general practice of the Navy, as stated by His Majesty's Advocate, that prize interests acquired by a prize master on board a captured ship, shall enure to the benefit of the whole ship's company. I am not aware of any instance in which this rule has been recognized or established by the decrees of this Court. It has prevailed, I conceive, without judicial authority, on the general notion which has been entertained of the intrinsic equity of such a communication of interest.

With respect to privateers, the shares of different persons concerned are regulated by articles of agreement, and when those articles are not literally applicable to the circumstances of the capture, their

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place must be supplied by the principles of natural equity and reason. By the 13th article of the agreement in this case, it is specially provided, "that those who are embarked on board prizes taken, *and* made prisoners, or shipwrecked, shall share in every thing taken by the privateer in their absence." The article is rather strangely worded, because being in the conjunctive, it might seem to imply that it would be necessary, that persons should be BOTH EMBARKED *and* TAKEN PRISONERS to be entitled to the benefit of it: though, I presume, it was not so understood, but that it would be sufficient, that they were embarked in a service, on which either of such consequences might be apprehended to ensue. The concluding part of the article is very comprehensive, "that they shall share *en tout ce que sera fait*," the articles being drawn up in *French*, as the vessel was a *Jersey* privateer. If that benefit awaited those who were detached from the vessel, it is to be inferred, I think, that the persons on board the privateer must expect to share in any capture or re-capture made by these individuals. If not, there would be an entire want of reciprocity, and a danger of that *iniquitous equity*, which has been so much apprehended on the other side.

In answer to all arguments drawn from the personal merit and gallantry displayed, it is obvious to observe, that these qualities might have been as conspicuous in any capture made by the privateer. She might have engaged a vessel of superior force, and have exerted as much address and bravery, and with equal success. The personal merit of the re-captors, therefore, will not affect the legal consideration of the question

question before the Court. It is said, that it will be hard on these individuals to have the fruits of their enterprize diminished, by dividing them with the privateer,—but have they not had an equivalent in their right to partake in the intermediate exertions of the privateer? They cannot expect to reap the benefit of their agreement, and to be permitted to renounce the disadvantages resulting from it. They must take both together. It is said, that they might have been captured in that enterprize, out of the line of their duty, and that then they might have forfeited the benefit of the agreement.—I will not take upon myself to say, what might have been the consequences, as to any enterprize wildly undertaken. This is not such a case. It is admitted that the design was wisely and prudently accomplished; and there is no Court, in which the re-capture of *British* property out of the hands of the enemy, could, I conceive, be considered as a violation of duty, in the situation in which these persons were placed. On these grounds I am of opinion, that the reward of salvage enures to the benefit of all united in the common cruise, as part of that undertaking; and that the principle of reciprocal equity applies to one description of capture, as well as to another. It never could be the meaning of the articles, that persons embarked on board a prize ship, should share with the privateer in her captures, and that the privateer should not share with them in any captures which they might make.

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Dec. 3d,
1805.

(Instance Court)

THE L'EOLE, ROSSBAU, Master.

Slaves, sent as proceeds, of a prize cargo, captured on the coast of Africa, to Barbadoes, for condemnation, as prize there, seized, under the revenue laws, and condemned as forfeited, &c.

THIS was a case of appeal from the Vice-Admiralty Court of *Barbadoes*, which had condemned the cargo of slaves, as imported into *Barbadoes* contrary to the provisions of the Acts, 12th *Ch.* 2d, 7th & 8th *W.* 3d, and the 26th and 39th of his present Majesty (a).

In support of the sentence of the Court below, the King's Advocate and Swabey.—This was a French vessel, which had been captured by three privateers on the coast of *Africa*, with a cargo of *European* goods and a few slaves on board. After the capture, the captors continued to traffic on the coast; and having disposed of the prize cargo, they purchased 200 slaves, and put them on board this ship, and sent them to the island of *Barbadoes*. On these facts two points arise, on which a breach of the revenue law may be assigned: First, that before the prize vessel was condemned, she was not entitled to a *British* register, and consequently could not trade to the *British* islands. 2dly, That it was a consignment in direct violation of the Acts of Parliament (b) that had passed for the regu-

(b) 39 G. 3.
c. 50. § 39.

(a) When the cause came first before the Court, it was observed, that the sentence of the Court below pronounced the condemnation of the goods as good and lawful prize.—From which term it appeared doubtful whether the proceeding had been in the Prize Court, or in the Revenue Court of Admiralty. The Court directed the matter to be referred back for information. It was now certified by the Judge of the Vice-Admiralty Court, that the proceedings had been in the Revenue Court; that there had been a mistake in recording the terms of the sentence as good and lawful prize, instead of seizure.

lation of the slave trade, and more especially of that provision (a) which directs that that trade shall only be carried on by vessels belonging to the ports of *London, Liverpool, and Bristol*. The only suggestion that is offered in justification of these irregularities is, the convenience or benefit of the speculation. But the Court will not permit such a plea to be set up against a manifest violation of an Act of Parliament. The supposed conveniencies in this instance are encountered by more forcible considerations of the same nature; since experience has shewn, especially during the last war, in the capture of two *Portuguese* vessels, the necessity of repressing the mischiefs arising on the coast of *Africa*, from captors proceeding to dispose of prizes there without the cognizance of any Courts of Justice; from which it has happened, that when restitution has been decreed, the property has been dissipated, and no proceeds are forthcoming to answer the demands of the claimant.

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(a) 39 G. 3.
c. 80. § 39.

On the other side, Arnold and Laurence.—This was a transaction proceeding out of a cargo of a *French* ship, that had arrived on the coast of *Africa*, and had begun to traffic, when she was seized by the captors. The articles of the outward cargo were evidently of no value, but for that particular trade; and therefore the captors thought themselves warranted in disposing of them, and shipped the present cargo as the proceeds of prize, and sent them to *Barbadoes* for the very purpose of being condemned. This intention appears, from letters which were written by them to their agent at *Barbadoes*. All the papers and necessary documents were sent there for the purpose of adjudication. Proceedings had been instituted against the vessel in the Prize Court, as a *French* vessel,

The
SOLE.

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1805.

and she had been condemned, without any particular notice being taken of the cargo. A few days afterwards, upon the 11th *February*, an information was laid against the cargo by Lieutenant *Duncan*, of His Majesty's ship the *Serapis*, who had just arrived from the coast of *Africa*, and who was acquainted with the whole transaction. It appears, also, that the captor had consulted this person on the coast of *Africa*, as to the course which he was pursuing, and that no objection was then suggested by him against the legality of the measure. In this state of the proceedings in the Court below, when the captors had actually submitted their case to the Prize Court of Admiralty, it was not competent to that Court to admit a suit to be introduced in another form, and in another branch of the Admiralty jurisdiction. The facts of the case were already before the Court, in the disclosure which the captors had themselves made; and if the Court had deemed it an illegal exercise of the prize commission, it was in the power of that Court to have condemned the property to the Crown, and to have proceeded with all the effect of a penal jurisdiction. The offence alledged, is *importation* contrary to law—But the term *importation*, is not to be taken absolutely, and without reference to the intention of the party. The vessel might have come off the island for the purpose of obtaining information. The design of *importing* contrary to law, the *quo animo*, seems to be the essential part of the offence. In this instance the intention is entirely wanting; since the cargo was sent in for the very purpose of being submitted to the Vice-Admiralty Court, and of receiving the sanction of its authority. As to what is said of the insufficiency of the excuse assigned,

assigned, it is to be remembered, that it was not merely matter of convenience, but of absolute necessity, that such things as constitute cargoes for traffic on the coast of *Africa*, should be disposed of in that country. There seems to be no alternative, except that of throwing them into the sea, or of sending them to the *West Indies* to be condemned, and from thence to be consigned again to this country for sale, at their *European* value, to become a second time part of an outward cargo to the coast of *Africa*. This would be to impose a burthen on the captor, which would render his prize of no value. In the cases which have been mentioned of *Portuguese* ships (the *Real Duque* and others,) the seizure was justified in some measure, by the Proclamation which had been issued by the Government of *Portugal*, declaring war against *France*, though it was afterwards withdrawn. In those cases the necessity of selling on the coast was so apparent, that it was made a principal part of the claimant's prayer, that they should be entitled to the amelioration of the property, and to the benefit arising from that conversion.

The
EOLR.

Dec. 3d,
1825.

JUDGMENT.

Sir *W. Scott*.—This is an appeal from the condemnation of the cargo in the Revenue Court of Admiralty, in the island of *Barbadoes*. It appears that this vessel, being a *French* vessel, had been captured by three privateers on the coast of *Africa*; that there were 14 slaves on board the prize ship, who were taken out, and put on board another vessel; that the remainder of the cargo was bartered away on the coast for a pretty numerous cargo of slaves, who were shipped on board this vessel, and sent to *Barbadoes* to be condemned as prize. The ship arrived, and proceedings were accordingly instituted in the

The
BOLK.
Dec. 13d,
1803.

Prize Court. An ordinary libel was given in, not stating how the slaves had been acquired, though this fact appears to have come out on the examination. Whilst these proceedings were pending, a seizure is made, under the Navigation Law, by a naval officer in His Majesty's service, and an information is lodged in the Revenue Court of Admiralty against the cargo. The Judge has condemned the cargo, on that ground, for a breach of the Revenue Laws, and I am of opinion that the sentence was properly given. It is admitted that the cargo is not prize in its own nature, but at the utmost only *the proceeds of prize*, on a conversion of the property; and it is said on that account to be subject to the jurisdiction of the Prize Court. I am yet to learn, that the proceeds of prize, illegally converted and to any extent, and at any distance from the original form of the subject-matter of the prize taken, are entitled to the privileges of Prize Property, so as to retain the right of being so considered, at the instance of the persons who have illegally or unjustifiably converted it. Over proceeds lawfully or justifiably converted, the Court has jurisdiction; the property in that case continues prize: But if the parties have departed, without any justification, from their instructions, and have been carrying on a commerce voluntarily assumed, and to any extent, the Court will not continue to property so acquired the character and favoured rights of prize property in their behalf.

The question is then, Whether there was any thing to justify such conversion? Authority there could be none, as there was no Court in that part of the world, under whose authority the conversion could be made. All that is alledged is, that it was done with some sort of approbation of *the naval officer*, who was at that

that time on the coast, but went afterwards to *Barbadoes*, and in consequence of his knowledge of the circumstances, made a seizure of the cargo on its arrival. It is, I think, a little too strongly stated, to say, "that it was done under the *approbation* of that Gentleman," since all that appears is, that he made no objection at the time, but that afterwards, on reconsideration, he altered his opinion, and declared that he would seize. If he had given the most direct approbation, it could have made no difference, on the question of law, nor could it have served in any manner as a justification to the parties.

The
Boiler.

Dec. 3d,
1809

As to the plea of necessity—Was there any necessity? It is to be observed in the first place, that captors have no right to convert property, till it has been brought to legal adjudication; they are not even to break bulk, they can have no justification for converting such property, except in cases of physical necessity, which overpowers all ordinary rules. If a case arises in a distant part of the world, and it is shewn that the goods were perishing, I must not deny that such a justifying cause of conversion might be pleaded upon property so acquired; but no such case is presented to the Court. It is not alleged that the cargo was perishing, but merely that the goods could not be sold as well elsewhere, or in other words, that it would not be so good a prize. That is not enough. It is not even averred in any affidavit, that the goods were of a perishable nature, or if perishable, that they might not have been disposed of to some other trader on the coast. Suppose the Court had gone so far as to justify a conversion; I cannot but think that the barter for slaves is the last mode of
conversion

The
ROLE.

Dec. 3d,
1805.

conversion that should have been adopted. The captors might have taken gold-dust, or other articles of commerce, known in the traffick of that country. To trade in slaves, is a species of commerce which the humanity of the Legislature has fenced round with peculiar regulations, every one of which is overlooked in this act of these individuals.

It is said, that the regulations of the Slave Trade do not apply to cases of prize. If a *French* ship (a) is captured with a cargo of slaves on board, I admit, they must be brought to adjudication in the condition in which they were found. But if I take a *French* vessel, otherwise loaded, and make her an open vessel for the traffic of slaves, it becomes then a voluntary commerce, and is, to all intents and purposes, *British* commerce, subject to *British* regulations. It has been urged, that this cargo was brought in for adjudication, and not for importation or sale, until a sentence of the Prize Court should be obtained. But the captors had no right to apply for any such sanction, with respect to a cargo which consisted not of prize goods, but of goods obtained in commerce. They may have been innocently mistaken, but I am of opinion, that the Judge of the Court below acted right, and that when the seizure was made, and the information was laid, it was his duty to abstain from any farther proceedings in the Prize Court, and to condemn the cargo, for a breach of the navigation law, and in the Revenue Court. The parties have acted without authority and any justifying necessity. They must be taken to have imported this cargo, in total violation of the

(a) Vide infra, *La Dame Cecile*.

regulations which the legislature has imposed. The sentence of the Court below must therefore be confirmed.

(Instance Court.)

Dec. 11th,
1805.

THE NELSON, MAIN, Master.

THIS was a case of pilotage, on a demand of *A. B.* for services rendered in piloting the ship from the *Downs* to *Gravefend*, and from thence to *Blackwall*. The summary petition stated, that the plaintiff had been engaged by the master to pilot the vessel from the *Downs* to *Gravefend*, for the sum of ten guineas and an half, and that on his arrival at *Gravefend* the master entered into a new agreement with him for four guineas and an half for bringing the vessel to *Blackwall*. In proof of this agreement, the petition pleaded, a draft drawn at *Gravefend* by the master on his owner for sixteen guineas.

Pilotage from
the Downs, Act
3 G. 1. c. 13.—
Rates how far
applicable to
persons not being
Trinity pilots.

On the part of the Owner, *Laurence* objected—That the agreement alledged could not be supported. That there was a special Act of Parliament 3 Geo. 1. chap. 13. continued by subsequent acts (a), which had fixed the rate of pilotage from the *Downs*, below the sum exacted in the present agreement, and that it was a point now depending before the Court in another (b) case, whether that rate did not include the whole course of the River, from the *Downs* to the port of *London*; the contract was therefore vitiated in law. Independent of that objection, it was a salutary principle of the maritime law, in cases of salvage, that agreements made with vessels in distress

(a) By 32 G. 3.
c. 37. § 4. to
25th March
1806, &c.

(b) *Louisa, Pike*, Master, 9th July, 1805.—The question there reserved was, whether the navigation required of the pilots described in that act, and for which specific rates are assigned, extends beyond the Hope Point.

shall

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NELSON.

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shall not be held binding. Cases of salvage, and cases of *pilotage* are so closely connected in their nature, and are so much comprehended within the same policy, that a demand of this nature, exceeding the just rate of such services, would not be that which the Court of Admiralty will carry into effect.

In support of the Petition, Arnold adverted to the terms of the Act of Parliament, and contended that it applied solely to a particular description of pilots, *being Trinity pilots*. The effect of the Act was to grant to these persons particular privileges of monopoly, or priority of service, which made it but reasonable that they should be limited in their rate of charges. When there are no persons of that description at the *Downs*, vessels are at liberty to engage other pilots, who are not affected, either by the privileges or the restrictions of the Act, and are at liberty to contract on terms, that may be agreed on between them and their employers. This was a case of that nature. The person employed was not a Trinity pilot, and it was in evidence under the hand of the master in the draft now before the Court, that the sum demanded was that for which they had mutually agreed,

JUDGMENT.

Sir *William Scott*.—This is a question of very general concern to the trade of this port, and therefore I could have wished, that as a cause of public import, it had been brought before the Court in a manner a little better instructed. The owner has not thought proper to offer any plea; but the case is left upon the evidence, which is to be extracted from the examinations taken, on the pilot's summary petition. It is stated, "that the first agreement was entered into

into for bringing the vessel to *Gravesend*, and that there was then a farther agreement for bringing her on to *Blackwall*, both which services were performed. But the owner refused to pay the money due under this agreement."

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On the part of the owner, it is certainly not a valid ground of defence that it was an agreement made only by the master, because the master's agreement in the service of the vessel, not affected by collusion or fraud, would be as binding on the owner as if made in his own person. It certainly could never be allowed that a master should draw persons into an agreement of this kind with a secret reservation in his mind, that it should not be binding unless by the owner's consent. If it was expressed in terms, that it should not be obligatory unless with the approbation of the owner, the person contracting would then know on what conditions he engaged. It cannot be maintained, that a secret reservation in the mind of the master should give such an interpretation to his act.

The ship comes to *Gravesend*, and it is suggested that the master entered into the farther agreement from necessity only, upon the pilot's refusal to come on to *London* under the first contract, which, it is said, was intended to include the whole course of the River to *Blackwall*. What should the master have done in prudence under such circumstances? He should have remonstrated, that the pilot was bound to bring the vessel to her moorings; and should have insisted on the full performance of his agreement. He would then have left his case open to the effect of the question, which is depending in another case, whether the pilot is bound to come on, or not. Instead
of

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of that he enters into a fresh contract, and gives the pilot a draft on his owner for 16l. for pilotage from the *Downs* to *Blackwall*. By so doing he sets his seal to the representation given on the other side. It is now alleged on the part of the master, that he would not have entered into that agreement but from necessity.—If that had been the fact, when he came to pay, at least he should have resisted, offering what was reasonable, and leaving the pilot to his remedy for the remainder. Instead of acting with that caution, at the very close of the transaction, he gives the man his draft, and thereby confirms the alleged agreement as much as was in his power to do.

If the contract is now to be set aside, it must be on one of two grounds, either on the Act of Parliament, as intended to restrain the rate of pilotage generally; or on the general exorbitancy of the demand, and the power of the Court of Admiralty to supersede such extortionate contracts, to which parties have been compelled to submit under a pressing necessity. As to the Act of Parliament, it is a question of great concern to the navigation of the River from the *Downs*, and therefore, I should have been glad to have had the assistance of persons more acquainted with the nature of this pilotage. Being left to my own opinion, I cannot but accede to the interpretation which has been put upon the Act, that it is limited to the particular society of pilots therein described, who have the benefit of a monopoly under the provisions of that Act. I am of opinion that the restriction is to be taken as corresponding with the privileges conferred, so that the persons enjoying the monopoly may not charge beyond certain sums. On one hand exclusive privi-
leges

leges are given, on the other, certain conditions are imposed, in favour of the public, in order that the monopoly may not be abused, as an instrument of extortion, to demand more than certain sums for the services therein specified. Under this construction, other persons engaged only in this navigation casually, and when the privileged class of pilots are out of the way, do not appear to fall within the purview of the act, and are therefore not to be held subject to the restrictions imposed by it. Then, as to the plea of an *outrageous contract*, I admit, that by the ancient maritime law, the Court of Admiralty would have an equity to moderate contracts made under the pressure of necessity, arising out of the situation of a vessel at sea; and it might embrace cases of this description. But there is nothing to shew, that there was any thing *iniquitous* in the contract. On the contrary, the evidence rather leads to a different conclusion, and it is all one way. Under these circumstances, considering it as a case, that is almost abandoned by the owner, who offers no plea, but has given in answers, which I have read, and which I think would only have been of disservice to his defence, I am under the necessity of pronouncing for the force of the demand.

The
NELSON.

Dec. 11th,
1805.

THE HOFFNUNG, RASK, Master.

THIS was a question respecting freight decreed to be a charge on the cargo, which was ultimately restored.

On the part of the Owners of the Cargo, the King's Advocate and Adams.—The Court will not decree freight

Dec. 18th & 19th,
1805.

Freight decreed on separation of ship and cargo.
—Demand to receive the cargo again on board, and proceed, not sustained.

The
HOFFMANN.

Dec. 18th & 19th,
1805.

* *Martha*, Mas-
sachusetts.

freight in this instance, unless the master will consent to perform the remainder of his voyage. He must either do this, or submit to a reduction of freight. In one case * 3 Adm. Rep. p. 106. it is true, the Court did with reference to a former case sustain the decree against the cargo, without imposing the obligation of going on; but they were cases very different from the present. In the *Martha*, a much longer time had elapsed; and in the *Hamilton*, *Rodman*, one material circumstance was, that the master considering himself discharged from the former contract, had actually entered into an engagement for a new freight, and was therefore no longer at liberty to go on. In the present instance the claimant of the cargo apprized the master, before his vessel was unladen, that the cargo would be speedily restored, and that he should call on him to complete his voyage, with an offer of an additional allowance for his time.

On the part of the ship, Laurence and Robinson.—It will be material in the first instance to state the dates. It appears that the capture took place on the 18th August, off the *Goodwin Sands*; on the 1st September the sentence of restitution of the ship passed, and a commission of unlivery was taken out by the captor on the same day. It was not completely executed till the 26th September; but it is said that notice was given to the master on the 25th, before the whole cargo was unlivered, that he would be required to go on. Such a notice addressed to the master could have no legal effect, since he was not the person in the possession of the ship, or charged with the commission of the Court. If it was intended to suspend the execution of the commission, it should have been by applica-
tion

tion to the Court to supersede the former decree. As to time also, it is to be observed, that it was presented on the 25th, during the unlivery, and before the restitution of the cargo, which did not actually take place till the 28th, and for which the claim was only given on the 24th. The actual demand to go on was not made till *October*, long after the unlivery had been completed. By the unlivery, the legal connexion between the ship and cargo ceases; by that act the master loses the lien which he had acquired, and could not resume his right and power over it. The connexion between the ship and cargo has been dissolved by the consequence attending the act of capture; and if any injury or inconvenience has been occasioned to the cargo upon that account, it is from the captors, and not from the owners of the ship, that a reparation must be obtained. The equity of the present case is also strongly in favour of the master, since it appears from his charter-party, that at the time of capture there were 32 lay days unexpired, and that he was bound to a port in the *Bay of Biscay*, which he expected to reach in five days. From the time of capture to the day of unlivery 42 days had elapsed; he had been detained therefore, in the service of the cargo, longer than if he had gone on to the place of destination. What the master required was, that his freight should be paid to him, and that if he was required to go on, it should be under a new agreement. This was no more than what the equity of his situation entitled him to demand. In the case of the *Martha, Martin*, the rule appears to have been laid down absolutely. And as to what is said of the subsequent engagement of the master, in the *Hamilton, Rodman*, it is obvious that such a fact, if it existed,

The
HOFFMUNG.

Dec. 18th & 19th,
1805.

The
Hoffnung.

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1805.

could not have formed the ground of that decision, since any precipitation on his part in engaging in a new contract, could not judicially exonerate him from the former obligation, if by construction of law it was still held to be binding upon him.

JUDGMENT.

Sir William Scott.—I have considered this case, and the cases which have been referred to, and I am of opinion that the owner of the cargo cannot come back on the vessel, and demand to have the cargo taken on board again. The captor who succeeded to the right of both, has invoked the authority of the Court to decree a separation; and the contract between them must be held to have ceased by the act of unlivery. At the moment of separation, the vessel acquires a right to proceed; and it is by accident only that she continues here. That accident cannot, I think, have the effect of reviving the contract which had been before dissolved.

I am fully sensible that this rule may occasionally operate with considerable hardship on the owners of cargoes. But the proper remedy for that inconvenience will be, to insert a special provision for such accidents in the charter-party (a). Rules of law being in their nature general, must in particular instances sometimes operate with inconvenience. That inconvenience has been the cause of introducing many special covenants, into bills of lading and other commercial instruments. I know of no other remedy that

(a) In some cases, charter-parties have appeared containing a clause for the time which the vessel shall be bound to wait, for the purpose of carrying on the cargo, in case of capture and subsequent restitution.

can be applied to hardships arising, in cases of this description, from the general principle of law, which I must pronounce to be, that the act of unlivery is binding on the parties, and must be taken to be decisive, in producing a complete dissolution of the contract.

THE VENUS, LASSEN.

Jan. 15,
1806.

IN this case the ship and cargo had been condemned on a former day to the captor, being a private ship of war, but a caveat had been entered, on behalf of a part owner, to prevent delivery of the interlocutory to the master, until bail should be given *to bring into the Registry so much of the proceeds as would answer his interest.*

Interlocutory of condemnation issues to the Master—Part owner not entitled to obstruct the delivery, on demand of bail to protect his interests.

The King's Advocate moved the Court to direct the interlocutory to issue, notwithstanding the caveat, and contended, that it was not competent to the party to object to the delivery to the master, for the purpose of sale.—On the other side it was prayed, that the party might be allowed to set forth his interest in an Act of Court, whereby it would appear that he was in possession of the legal title, in the proportion claimed by him; that, as there was some dispute respecting his share, he had evidently an interest to guard against the property being delivered out otherwise than on bail to answer his demands.

The Court.—If the interest of the part owner was clearly established, it would not be competent for him to object to the delivery of the interlocutory to the captor, who is the person legally entitled to it. If there is any reason to apprehend any inconvenience or injury to his just rights, his remedy is of another kind.

Interlocutory directed to issue.

Jan. 15th,
1806.

THE MARIA POWLONA, HEMMES, Master.

Costs and damages, after restitution by consent, and the ship had gone away, not sustained.

THIS was a demand for damage brought on behalf of the owner of a neutral ship, which had gone away under a restitution accepted without reservation of any question.

On the part of the Captors, the King's Advocate.—

The circumstances of this case are not of a nature to lay a ground of complaint against the original seizure. It was the case of a vessel going from *Riga* to *Nantes*, a port in the vicinity of *Brest*, with a cargo of masts. It will scarcely be disputed that the seizure was justifiable; but all considerations of that kind are done away by the act of the claimant, in accepting restitution. The vessel is gone away, and it would be a grievous inconvenience to captors, if, after restitution has been decreed, and all the original evidence has been withdrawn, they can be called upon to justify themselves against a complaint set up merely on the protest of the claimant. An attempt of this kind was made on a former occasion, and over-ruled. The Court will, it is submitted, adhere to the same rule in this instance.

On the part of the Owner, Laurence stated it to be a matter of considerable importance to neutral owners, and so felt by them, that their demands for indemnification should not be precluded by the act of their master, or agent, in accepting restitution for the dispatch of business, and with a view to prevent the detention of the vessel, when he had not the opportunity of consulting his principal, or of being acquainted with his intention of prosecuting his claim farther for costs and damages.

damages. On these grounds it was hoped that the Court would give the owner an opportunity of laying his case before the Court.

The
MARIA!

Jan. 15th,
1806.

JUDGMENT.

Sir *W. Scott*.—The claimant in this case has, I think, put himself out of all possibility of obtaining relief. The vessel was a *Russian* ship, carrying a cargo of masts from *Riga* to *Nantes*. This is all which I am able to collect of the circumstances of the case, and *that* only from the protest of the master, since the original evidence is withdrawn. How the vessel was documented, or under what particular circumstances the seizure was made, is entirely removed from the view of the Court. It is therefore impossible for me to pronounce, that the person making the capture was so in fault, as to be liable to a sentence of costs and damages. From what has passed there is reason to presume that the seizure was perfectly justifiable. On the papers being brought in, a proposal was made to the master that he might proceed on his voyage; and it must be understood to have been an absolute and unqualified proposal, and meant as a general acquittal on both sides. If there had been any intention to prosecute a demand for damages arising from the seizure, the offer should have been accepted *sub modo*; instead of that, the restitution was accepted in the manner in which it was proposed, and as such must be understood to include an act of amnesty on both sides. It is not for the parties then to come again before the Court, after all the papers have been withdrawn, and charge the captors with an unjustifiable seizure, when they have, in consequence of the restitution, lost the opportunity of defending themselves. The claimant must take the inconvenience

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with the convenience of restitution. I am of opinion that the claimant has put himself out of Court, and that the offer of restitution, being accepted as it has been, must be considered as a discharge.

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L'ALERTE, DEMAY, Master.

Head-money—
not shared with
constructive joint
captors—*Case*
cited from the
Lords held deci-
sive authority.

THIS was a case of an allegation of joint interest on the part of several ships forming part of a squadron under Lord *Keith*, on a claim to share in the head-money due on the capture of the *L'Alerte* and another *French* frigate, by His Majesty's ship the *Centaure*, which had composed part of the squadron, and had chased in common with the rest.—The allegation set forth the situation of the vessels, and pleaded, That, “ at the time of the capture of the said ship *L'Alerte*, His Majesty's ship *Defence*, as well as the other ships of the fleet, was in chase and aiding, and as such assisting in the capture; and that the captain, officers, and crew, of the said ship *Defence*, are by reason thereof not only entitled to share in the proceeds of the hull, stores, arms, and ammunition of the said ship *L'Alerte*, but also to share in the bounty or head-money arising from the capture thereof.”

(a) Lords,
26 July, 1799.

On the part of the Captors, the King's Advocate adverted to the facts set forth in the allegation, and submitted that the case was decided by the *L'Hercule* (a), which had gone up to the Lords of Appeal, for the purpose of fixing the principle of law, which had been before rather unsettled in the practice of this Court; that the Court of Appeal did in that case decide

decide conformably to what had been held to be the better opinion in this Court, that the principle (k) of

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(k) Old cases to this effect appearing in the Court-Books, are the *Princessa* (a), the *Panther* (b), and the *Dangé* (c), which last case, as it seems to have been a case of particular circumstances, is here set forth, as it is stated in the Court Book.

(a) 27 Nov. 1740.
(b) 21 June 1749.
(c) 23 Nov. 1763.

The *Dangé* was a *French* privateer, with 62 men on board, taken by four armed boats, "in His Majesty's service for that particular purpose, and under the command of Lieutenant *M^r Bride*, the said boats being armed and manned out of His Majesty's ships the *Maidstone* and *Melampus*."

An appearance was given for Lieutenant *M^r Bride*, Commander of the *Grace* cutter, in His Majesty's service, and the crews of four of His Majesty's armed boats, employed under him for the purpose of taking the ship *Dangé*, the only captors in fight, and prayed them to be pronounced so to be, and as such the only persons entitled to head money. In the presence of *Tindal*, (King's Proctor) praying the condemnation according to the Monition. He gave an allegation, which the Judge admitted, &c. and assigned the cause for sentence immediately, and having heard Advocates, &c. pronounced the ship and goods to belong to enemies, &c. and condemned the same as lawful prize, according to the Monition: but pronounced that Lieutenant *M^r Bride*, and the crews of the four armed boats, were the only persons in actual engagement with the enemy, and therefore that the head money ought to be shared by them only, and decreed the same. No. 10, fol. 41.

That the rule of *constructive assistance* has no necessary application to cases of head-money seems obvious, from the different grounds on which these two species of interests are founded. The reward of head-money is of much later introduction, and was established expressly for the purpose of exciting personal enterprise, and of counterbalancing present danger, by peculiar and appropriate rewards.—It is in this respect widely distinguished from the considerations on which the doctrine of constructive assistance is built. That is a rule which has grown up from usage immemorial, and which, under the later opinions of the Prize Courts, is not to be extended (d). It rests altogether in most instances upon presumptions of rather a loose texture, and is a measure of service more to be justified in its general consequences, than in any precise reciprocation of enterprise and reward that can be attributed to the greater number of claims of that description.

(d) Supra,
vol. 2, p. 22.

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constructive assistance did not extend to head-money. The Act of Parliament expressly directs *that the bounty or head-money should be paid to the takers*; and in the late Prize Act this was made more strong, by the addition of the "*word actual taker*." [Court.—*This being a case of the last war, must be decided by the former Act.*]

On the other side, Laurence and Burnaby contended—That as the word "*taken*" in the Prize Act was held to extend to constructive assistance, so ought it by the same interpretation to extend to all interests arising from capture; more especially in a case like the present, where the merit of all the parties was the same, and depended solely on the sailing of their vessels, as there was no actual engagement, and no personal danger encountered. That the case did not fall precisely within the principle of the *L'Hercule*, since in that case it was much relied on, that the fleet had not chased; in this instance joint captors had all chased by general signal, and might have been at hand to have rendered assistance, if any engagement had taken place.

In Reply, the King's Advocate observed—That it was not necessary for a whole *squadron* to chase, in order to acquire an interest to share in prize made by one of the *squadron* detached in chase: therefore the circumstance of their having all joined in the chase would not be material to distinguish this case from the *L'Hercule*, which was a stronger case, inasmuch as the whole *squadron* had seen the chase. In the decision of that case, even the vessels which had been detached

tached by signal in pursuit, and were not denied to be in fight at the time of capture, were held not to be entitled to share in the bounty *or* head-money.

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JUDGMENT.

Sir William Scott.—I am of opinion that this case is decided by the *L'Hercule* (a) and the authority of former precedents in this Court, in which it was always understood, that the claim to share in head-money stood upon a different principle from that, which governs the general interests of joint capture. It is within my knowledge, that the word *actual taker* was thrown into the present act, to justify the construction, which, though supported by practice, was not distinctly expressed in the words of former Prize Acts.

(a) Lords,
26 July, 1799.

The distinctions which have been raised to take this case out of the range of former precedents are three: The first is not founded on fact, viz. “that a principle of association applies to this case, which did not operate in the *L'Hercule*, since there was no order for a general chase.”—There was an order to particular ships, and the remainder followed up, and were included in the actual pursuit. In some respects, indeed, that case may be considered as stronger than the present, since the prize had been descried by the whole fleet, which is a fact that is left very doubtful in the present allegation: It is I think rather to be collected from the manner in which it is stated, that the fleet did not see the strange sail till the next morning after the capture had been completed. The second distinction is, that in that case there had been an action, and that there was none here. This distinction

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tion fails in fact also. It cannot be said, that there was no engagement, *since some guns were fired*, and it is utterly impossible to adopt a principle that should lead this Court into a discussion of the degree of resistance, and the manner with which it was made, whether to preserve the point of honour only, as it has been intimated, or with the intention of supporting an actual contest. It is not required that there should be an actual fight to support the demand of head money on the part of the taker, since, if the enemy is overpowered by superior force, the surrender operates in the same manner, and to the same effect, as if he was subdued in actual contest (*a*). The third distinction is, that there was a signal to the whole fleet to chase in this instance, and not in the *L'Hercule*,

(*b*) Acts, 1739
& 1779. Force.

(*c*) Acts 1803
& 1779. Take
or destroy.

(*a*) The bounty of head-money is given in the Prize Act, 27th June 1805, in these terms, "That as a further encouragement to the officers, seamen, marines, soldiers, and others, on board His Majesty's ships of war (*b*), as also of privateers, to attack (*c*) any ships of war, or privateers, belonging to the enemy, there be paid (*to the above enumerated*) who shall have been actually on board any of His Majesty's ships or privateers, at the actual taking, sinking, burning, or otherwise destroying any ship of war, &c. £5. for every man who was living on board any such ship so taken, &c. at the beginning of the attack or engagement between them."

This clause agrees with a corresponding clause in the preceding Prize Acts, 12th August 1803, 17th June 1793, 19th Geo. 3d, cap. 67, 13th Geo. 2d, 1739, with the slight variations above noted in the margin. It corresponds also in substance, though not precisely in form of expression, with the earlier Prize Act of the 8th Anne 1708, which first established *this species of bounty*. The terms there used are, "And for the further encouragement of such officers, &c. who shall actually serve on board any such of His Majesty's ships of war, or privateers, as shall take any ship of war, &c.

There

rule. But that objection is answered before, by what has been said of the vessel that did effectually chase

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There shall be paid, to the officers, &c. on board such of Her Majesty's ships in such action, when such ship of war shall be taken, £5. for every man on board such ship so taken at the beginning of the engagement between them."

In these acts there is not any mention of the condition "*taken in fight*;" neither have we an authority to suppose that such a distinction has at any time prevailed *in practice*. The term *fight* is used, indeed, in the entries of the Court Book, in the cases stated *supra*, Note, page 209; and more particularly by the actual captors, in the *Dangé*, in support of their right against a claim of constructive joint capture. But in all the instances in which it occurs, it is used as between the actual taker and claimants on constructive assistance, and not in any case, in which the claim of the actual captor appears to have been disputed *on that circumstance*. The use of the term in the pleadings and in the language of the Court, may perhaps be accounted for, by supposing that it was a form continued from the older practice of pleading, in claims for the bounty of gun money, as given prior to the statute of Anne 1708, at £10. per gun, EXPRESSLY "*for ships of war taken in fight*." With respect to that, it does appear from an entry of the 13th of March 1706, that "It was ordered by the Court, that where the captains of men of war do pretend to charge the Queen with gun-money for ships taken in *fight*, such captains (if the Queen's counsel insist upon it) are to prove the capture to be in fight, by witnesses, examined upon an allegation, where the Queen's proctor may have an opportunity to cross-examine the witnesses."

Even this order seems to imply that the practice *had been* different; and if it is considered that the rule had been thus brought under review so recently as 1706, and that in the Prize Act immediately following, in 1708, in which *head-money* was given for the first time, the condition is altogether omitted, we are rather led to infer, that it was not even at that time intended to be continued, as a rule of construction, so as to make '*FIGHT*,' in its popular sense, a necessary ingredient in claims for head-money on the part of the actual taker.

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by signal with the actual taker, and yet was not permitted to share. I am of opinion, therefore, that the authority of the adjudged case is decisive against this claim, and that the allegation must be rejected.

Laurence prayed that the expences might be paid out of the prize.

The Court asked if that was consented to.

The King's Advocate said, that he had no authority to consent.

Laurence said, That it was always found to be most satisfactory to the parties and to the whole fleet concerned, that questions of this kind should be decided by the authority of the Court; and though the principle had frequently been laid down, there had still been a recurrence to the Court.

Court.—I will allow the expences in this case; but it must now be understood, that this point is settled as far as this Court can decide it, and that it must not be mooted again.

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SAN JOSE, DE SOTA, Master.

Claim of joint
capture —
Admission on
the part of the
captain of a pri-
vateer, at the
moment of cap-
ture, how far
binding.

THIS was a case of joint capture on a claim of His Majesty's ship *Euryalus* to share with the actual captor, the private ship of war the *Mayflower*, on the suggestion of *being in fight*.

On the part of the Privateer—It was denied that the *Euryalus* was in fight, and on this point the case was argued much at length on the effect of the evidence.

In support of the claim—Reliance was placed on a paper

paper writing, pleaded and exhibited (a), which the captain of the privateer had signed as an acknowledgment at the time that the *Euryalus* was in fight.

JUDGMENT.

Sir *William Scott*.—This ship with a valuable cargo on board was certainly captured by the privateer; though possession was afterwards taken, but not exclusively, by Captain *Blackwood*, of the *Euryalus*, under an erroneous opinion, that a King's ship, being in fight and in chase, and being entitled to a greater proportion of interest, from the number of her crew, had a right to the possession. This is certainly a mistaken notion, which has appeared in other cases, but which will no doubt in future be corrected—It is a pretension against which this Court will always support the actual captor, unless some justifying necessity or expediency is shewn in the particular instance.

The allegation states *the being in fight*, and on this simple *fact* it is that the whole case depends, since there is no question of law involved in it. The general course, in cases of this kind, is, that the parties setting up a claim of joint capture, are called upon to establish their interest, and to make out their case to the satisfaction of the Court. But it happens, in this instance, that the *onus probandi* is shifted, because there is produced, an *exhibit*, containing as direct an acknowledgment of the fact, on the part of the cap-

(a) I, *P. Benest*, master of the *May Flower* cutter privateer, from *Guernsey*, do acknowledge that His Majesty's ship *Euryalus*, commanded by the Honourable *Henry Blackwood*, was in chase of and in fight of the *Spanish* ship *San Josef Andrea*, whom we took possession of about half past nine o'clock A. M. and that the said ship's boat, with the First Lieutenant, boarded me at 11 o'clock of A. M. D^y. Given under my hand on board His Majesty's ship *Euryalus*, 3d March 1805, at sea.

Witness,

J. Kn Toby, Purser.
Alexander Denmark.

PH. BENEST,
Master of the *May Flower*.

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tain of the privateer, as can be expressed in words. It is a direct acknowledgment *recenti facto*, and by the captain, who is empowered to act for the owners and crew, as well as for himself. The effect of such an instrument is I think conclusive, to put the other party in possession of every legal right, unless it can be set aside and discharged, by being shewn to have been obtained under circumstances, that will render it invalid. Whatever the truth of the case may be, every one must perceive, that to make out a case in opposition to the direct acknowledgement of the party himself, must be an arduous undertaking. It is no less than this, that after having admitted the fact himself, the party shall apply to the Court to draw a different conclusion, and in the face of an instrument, strengthened by the formalities of witnesses, and containing a direct acknowledgment of the point now put in issue.

It is not easy to conceive a case, in which this can be effectually sustained in any other manner than by the proof of duress and violence, which would vitiate the effect of the most solemn instrument whatever. It was pleaded therefore in the allegation with this intent—"That the captain of the privateer remonstrated against the claim, and requested that the *Spanish* captain and mate might be examined, as to the fact, but that Captain *Blackwood* refused, and abused him in very violent language, and swore, that he would distress him and have twenty more of his men pressed; and that seeing it was impossible to avoid signing the same without losing his crew and his commission, and to avoid the threats of Captain *Blackwood*, he was induced to sign the paper under terror." Supposing for a moment that there had been any thing of that harshness, which is sometimes

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imputed to King's ships in their behaviour to privateers, and which this Court will never see in any case without animadversion; admitting that Captain *Blackwood* could be guilty of so foul a conspiracy, as to endeavour to compel this man by threats to sign a paper in opposition to the truth, are we to suppose that there was no firmness on his part to resist, or that he could be ignorant that Captain *Blackwood* had no authority to deprive him of his commission; and that if he impressed his men for any malicious purpose, not warranted by the exigencies of the public service, he would be responsible for such misconduct?

Upon this part of the charge that relates to the pressing of his men, it is impossible for me to entertain the question, or to judge whether it was a vexatious act, or whether it might not be done under circumstances that made it not only justifiable but meritorious. But it is easy to perceive that the consequences attributed to this act, as a measure of intimidation, ought not to have produced any such effect. For what would have been the utmost that could have ensued from it?—It might have broken up the cruise, and have obliged the captain to return home, which is not more than it was his duty and his interest to have done. On the capture of a valuable prize worth 10,000*l.* which had been taken out of his possession, it could scarcely be felt as any inconvenience to have come home, to obtain condemnation of the prize, and to get the possession restored to him—At any rate he should have refused to comply with such a request, instead of signing a paper of this kind, giving away the interest of himself and his crew. If persons will appoint men of weak nerves to fill situations of this description, to which they must on many accounts be obviously unfit, they must take the consequences.

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consequences. But is there any reason to suppose that he was a man of this cast? In one instance it appears that he had firmness to resist, and that he did actually refuse to sign the declaration in the log-book; and, as it is deposed by one of the witnesses, "because he said he did not see the *Euryalus* himself, though he believed she was in sight."

These observations proceed on a supposition that the excuse is true, and that the allegation is fully proved. But the fact is, that it rests wholly in allegation, and is not proved in any one circumstance. It appears indeed, that there was some discussion in the way of demur or reasoning, but no act of violence or compulsion is spoken to by any one witness. Then was there any declaration on the part of the Master to his own crew at the time? It is quite impossible to suppose that he would not have proclaimed the injury, that had been done to him by the *Euryalus* as soon as he came on board his own ship. He is indeed stated to have thrown out one expression of complaint.—"Never mind, my lads, when we get to *London* we will see to whom the prize belongs;" but this is very referable to the disputed right of possession between them. It might, I say, have been expected, that a person having been treated as this master now describes himself to have been, would have made a declaration as to this particular conduct, and that many of the privateer's crew would have been able to speak to it.—What makes the inference from this silence so much the stronger is, that complaints are made of other parts of Captain *Blackwood's* conduct; yet, when the parties come before the Court to obtain possession of the prize, there is no mention of this injury.—There is no protest, nor any notice taken of it in any manner but in the

responsive allegation, and then it is in no manner substantiated in proof.

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I am of opinion that the effect of this acknowledgment not being taken off, is evidence of the highest species, *recenti facto*, coming from the principal person himself, and that it is scarcely to be averred against. I do not say that, if there had been any collusion between the King's ship and the captain of the privateer, it is such an instrument as would have been binding on the owners and crew. But there is no such suggestion; and therefore there is no reason to enter upon the discussion of such a case. Taking the acknowledgment to be unimpeached, I am of opinion that it is decisive.

But the case does not rest here; for I think that, on the general result of the evidence, both as to the probability, and the facts stated, the *Euryalus* must have been in fight. The evidence in preparatory contains a direct assertion "that she *was* in fight," and without going through the minute observations which have been made on the position of the vessels, and the state of the winds, which the effect of the acknowledgment before discussed renders unnecessary, I think, there is something in the very detailed and circumstantial account given by the releasing witnesses, which places them rather in a more favourable situation of credit, than is usually ascribed to witnesses of that description. Upon the whole, all the particulars confirm me in the impression which I have entertained throughout the whole of the case, that the paper contains a true representation of the fact, and that the *Euryalus* is entitled to share.

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THE EBENEZER, CHRISTENSEN, Master.

Continuous voyage—in the coasting trade of the enemy—with the colourable interposition of a neutral port, fraudulent.—Penalty of confiscation.

THIS was a case of a *Prussian* ship, with a cargo of wine and brandy, taken on a voyage from *Embden* to *Antwerp*. The bills of lading described the cargo to have been laden at *Embden*; whereas it came out in the depositions of the witnesses, "that the wine and brandy had been brought immediately from *Bourdeaux*, and had not been unladen, but had failed again in three days with a new clearance to *Antwerp*."

On the part of the captor, the King's Advocate and Phillimore contended—That the voyage was in effect and substance to be considered as a voyage between *Bourdeaux* and *Antwerp*, in the coasting trade of *France*, and as a continuous voyage, notwithstanding the colourable interposition of a neutral port; that the papers, purporting the lading to have been put on board at *Embden*, were false; that under these circumstances, it was a case in the coasting trade of the enemy with false papers, and as such subject to condemnation.

On the part of the claimant, Laurence and Robinson contended—That the description given of the cargo "*laden at Embden*" would not affect the case with falsehood of the nature of fraud, although in fact the goods had never been unladen; that the term *laden* might be *used* as the ordinary Custom-house phrase, without design of imposing upon any person by that representation, as it had occurred in a case before in
the

the same sense (a); that the principle of extending to the ulterior destination the consequence of a continuous voyage, had never been applied but in colonial cases; and there, only, to obviate and counteract the stratagems of fraud and colour which were resorted to for the purpose of effecting by *circuitous* voyages, *that which* was known and acknowledged to be illegal in a direct course; that when colonial restrictions did *not* apply, produce brought from settlements of the enemy, as from the *Isle of France*, and going on to the Mother Country, have not been held subject to particular enquiry respecting the nature of their importation, or the slightness of their connection with *America*. That this transaction, if considered as a continuous voyage, would not support the principle, since it was a voyage which was not illegal in the direct course, and would not have drawn any penal consequences upon the property. That there was nothing to shew, that it *was* a continuous voyage, going on under an original design, or that the ulterior voyage had not originated in fresh speculations, after the cargo had been *bona fide* imported into *Emden*. That on these grounds the Court would dismiss this ground of objection, as it did in another case, the *Martha Van Comminga* (b), in which it was urged, and in which farther proof was directed to be made of the property.

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(b) Sept. 13,
1805.

(a) *Schoone Sophie*, August 1, 1805. A *Prussian* vessel, from *Emden* to *Antwerp*, with colonial produce, brought from the Island of *St. Bartholomew*, or, as it was argued on grounds of probability and suspicion, originally from a *French* Island, having laid five weeks in the port of *Emden*, without being unladen.

The Court refused to direct further proof, but restored the cargo; observing, that there did not appear to be any intention of imposing a false impression respecting the shipment, or the nature of the cargo.

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ESSENER.

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JUDGMENT.

Sir *William Scott*.—This Court has held, that the carrying on the coasting trade of the enemy with false papers is cause of condemnation (a); and whatever

(a) In addition to the traces of ancient practice, respecting the coasting trade of the enemy, collected p. 74, two other instances are here to be noted, which may serve *materially* to elucidate some of the facts submitted in the former note.

The first is to be found in Sir *William Temple's* Letters from the *Hague*, in the year 1674, on a demand made for the restitution of the *Englisb* ship *Rebecca*, which had been captured, we may suppose, on a voyage between ports of *France*. In a letter of the 6th of *November* 1674, he gives an account of what passed between him and the Grand Pensioner; from which it appears, that the States of *Holland* then contended for the principle of exclusion, on the authority of *general reasoning, and the practice of nations*; whilst Sir *William Temple* argued for the more extended interpretation of the late *Dutch* treaty. "The heads of his (the Grand Pensioner's) argument, were the judgment he pretended of several authors upon the point, the practice of *France* and *Spain*, and *Sweden* with them, and ours, at the time of his late Majesty and king *James*; which he undertook to give examples of: and, lastly, "that it could not be the meaning to drive an enemy's trade, but only to preserve a friend's." To this Sir *William Temple* replies, "That he did not much regard the opinions of general writers on these subjects, &c. That for the practice of other Kings with them, it was no rule for them with his Majesty. That for the practice the Grand Pensioner offered to produce on our parts in his late Majesty's time, he should be content to see it, but could tell how it would not square with the present case; since it was grounded upon articles never in force between his Majesty and this State, till the Treaty of *Breda*. "After a long and warm debate, he says, I gained from the Pensioner, "that for his own part, he was content that it should be as I desired it, since the king understood it so, and it was to be reciprocal between us."—See the Letter at length, Sir *William Temple's* Works, vol. ii. p. 313, 314.

And again, *August* 13, 1675.—"I fell afterwards into the discourse of the two points our late Marine Treaty is still a little lame in; the liberty of trade from enemy's to enemy's port; and, the manner of revision."

"After

whatever may be the declarations of *France*, which have been alluded to, as holding out assurances, that foreign

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"After opening the whole matter, and reading at last the declaration as you had drawn it up, I prevailed with him to fall in with it, upon these conditions: That, on our side, it should not extend to any thing that happened before the last war: and, on their side, it should extend to the release of all taken upon that pretence since the last Peace. And the first of these I was easy in, because I knew very well, there could be no case that concerned it before the last war, when both we and they were in peace with all our neighbours, from the first conclusion of this article in 1668, till the last war began. Hereupon he resolved, (though it cannot be absolutely concluded, till an assembly of the States of *Holland*) however, to propose it to the States-General, and endeavour to have it agreed by them, under the approbation of the States of *Holland* at their next assembly, which will be about a month or five weeks hence. Ibid. p. 334.

Another instance occurs in 1691, when *Denmark* and *Sweden* having entered into certain stipulations for the protection of their commerce against the countries then at war (a), an ordinance was issued by the Government of *Denmark*, for the regulation of the trade of *Danish* subjects (b), which seems to have led to a treaty between that State and *England* and *Holland*, then allied against *France*, "touchant le commerce en France" (c), of which the Third Article stipulated:

(a) 10th March
1691, and again
17th March 1693.

(b) 19th May
1691.

(c) 30th June
1691.

"Que dans les vaisseaux Danois il ne sera trouvée aucune marchandise ennemie, & sera transportée des Havres de France en d'autres, mais seront obligés, leur cargaison étant faite, de les conduire des villes & places ressortissantes sous la domination de sa Majesté de Dannemarc allant & revenant, en la manière qu'il a cy-devant été offert à leurs Hautes Puissances par sa Majesté de *Suede* & comme la susdite offre n'a pas connue jusques à present, a bien voulu consentir au susdit article *ad interim ut supra*, pour le tems de huit à neuf mois enforte, néanmoins que par là il ne sera fait aucun prejudice à la navigation de ses sujets pour les places neutres."

In *December* of that year, the same principle was more fully extended, in the following additional articles, termed, *Articles d'Amplification et Explication*:

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foreign vessels shall be admitted into the coasting trade of that country, as a permanent regulation that shall continue

“ 3d.—Quemadmodum in dictæ conventionis articulo 3^o conventum est, quod navibus ad Serenissimi et Potentissimi Danicæ & Norvegicæ Regis subditos pertinentibus, non liceat merces ullas Serenissimi & Potentissimi Regis Magnæ Britanniæ, aut Cel. & Præp. Ordinum Generalium Unitæ Belgii hostibus proprias, ex uno portu Gallico in alium vehere & transferre; hiscæ præsentibus insuper declaratur, dicti articuli verum & genuinum sensum esse, quod navibus prædictis, nisi mercibus omnis generis plane vacuæ fuerint, nequaquam licitum erit, ex uno portu Gallico in alium navigare & transire, nisi eveniat ut integrum navium istarum onus in uno portu divendi non possit, quo casu illis liberum erit, quod de onere hoc superest, dividendum in alium portum transvehere & transportare.”

4th.—“ Quod dicti 3ⁱ articuli sensus ulterior sit ut naves subditorum Serenissimi & Potentissimi Regis Danicæ & Norvegicæ in Galliam navigaturæ in portubus jurisdictioni Imperii Romani aut partium bello præsentis implicitarum, subjectis non onerentur; sed ex portubus Serenissimi Regis Danicæ & Norvegicæ extra imperium, aut etiam mari Baltico recta, versus portum destinatum in Gallia vela facere & cursum prosequi, indeque recta etiam via reverti teneantur; nec eundo vel redeundo ad partium dictarum oras appellere, ibidem morari, earumque portus ingredi ullo modo licebit; nisi vi tempestatis manifesta ad id fuerint coactæ, & in hoc casu, sicut merces in Galliam vehendas ibidem non onerare, ita nec è Gallia advectas ibidem exonere poterunt.”

The substance of this stipulation was continued in the succeeding war, as part of the general instructions to cruizers, 11th May 1706.

“ That Danish ships being furnished with necessary passports, together with the authentic certificates relating to the oaths required by the convention with Denmark, the form of which passport and oaths are hereunto annexed; and there being no suspicion of their having naval stores on board, may pass freely; except such ships have not disposed of their whole lading in the first port of France where they touched, but, together with the remainder of their lading, have taken in other goods in the first port of France, and are proceeding towards another place within the territories of the French king with the same: and also except in the cases before-mentioned.”—To which was added, as part of the oath prescribed

continue a century, and this, notwithstanding all the changes that have taken place during the last fifteen years, this Court will certainly not act upon the credit of such declarations, but will adhere to its own principle, that the carrying on the coasting trade of the enemy with false papers, subjects the property to confiscation.

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It is not to be doubted, I think, that the original scheme of this voyage was from *Bourdeaux* to *Antwerp*; and upon the ground which has been pressed in argument, the very short stay in the port of *Embsden*: The ship arrived there on the 8th *July*, and sailed again upon the 11th, after a stay of only three days. But this is not all; for I perceive that the bill of lading is dated on the 9th, on the very next day after the arrival. Am I rash then in concluding from this circumstance, that the original intention of the voyage was from *Bourdeaux* to *Antwerp*? Very different is it from the case, which has been cited, in which the ship *had been lying three weeks in Embsden*. That material fact afforded time for new speculations, and rendered it equivocal at least, whether the ulterior voyage, which was afterwards pursued, did not spring from some change of intention, which had taken place in the mind of the owner. Here, on the contrary, it is fairly to be presumed, from the hurry in

to be made by *Danish* ship masters, on obtaining their passports, the following form:

“That the said ship shall not carry any goods whatsoever to *France*, which were taken in at any places subject to the empire, or to the parties now in war; nor shall unlade any goods, once laden in *France*, in any other port of *France*, or in the said places subject to the empire, or to the said parties now in war, in her return, if by chance she should be compelled, by stress of weather, to put into such places.”

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which the business was conducted, so as not to leave time for a new charter-party (a), that the destination to *Antwerp* was the plan of the original voyage; as such, it is to be considered, for all purposes of reasonable construction, as a voyage from *Bordeaux* to *Antwerp*.

It is said, that there has been no fraud practised; that the parties were doing no more, than they might have done in a direct way. But is it *no* fraud? Is it not rather a double fraud, to represent the voyage from *Bordeaux* to have been to *Emden*, and the voyage to *Antwerp* to have been from a neutral port? Is the holding out *Emden* as one of the terms of each voyage, nothing to lull to sleep the suspicions of *British* cruisers? And when I say suspicions, I mean legal suspicions, as to the presumption of enemies property, and the rules under which that presumption would become a subject of more rigorous investigation. Deceit was practised, as to the destination; and I must think, a fraudulent deceit, for the express purpose of evading the jealousy and vigilance, with which a direct destination in such a trade would have been considered; I shall therefore reject this claim.

The ship had been restored by consent, but the King's Advocate prayed the Court to pronounce against the claim of freight and expences.

Court.—I shall not do that, because it is possible that the owner of the ship might not be conscious of the intention under which the original destination was continued.—Freight and expences given.

(a) The master had said, "that on his arrival he was ordered to go on under a new verbal agreement as to the freight, as there was no time for a regular charter-party."

(Instance Court.)

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LA DAME CECILE, BARRET, Master.

THIS was a case on appeal from the Vice Admiralty Court of *Barbadoes*, as to a prize ship and cargo of slaves, which had been seized by the garrison of *Goree*, who took the usual examinations, and forwarded them, with the ship papers, to the High Court of Admiralty for adjudication, where the ship and cargo were condemned. They were in the mean time sold to a *British* merchant, who sent them to the island of *Barbadoes* for sale. On their arrival in that port, a seizure was made, and proceedings were instituted against the ship and cargo as imported into a *British* island in violation of the 26th (a) and 29th (b) *Geo.* 3. and a sentence was pronounced upon them.

Prize Slaves, taken to Barbadoes for importation, if under the restriction of the Revenue Laws? restored.

(a) c. 60.
(b) c. 80.

In support of the sentence of the Court below, the King's Advocate and Arnold contended—That it was a case similar to the *Eole* (c), and was on the same principle subject to condemnation; as a breach of the Navigation Act, and also of the Act (d) passed for the regulations of the Slave Trade, which prohibited *British* subjects from carrying on that trade otherwise than under certain restrictions therein specified, and in vessels which had been fitted out from the ports of *London*, *Liverpool*, or *Bristol*; that if the breach of the Acts of Parliament could, in any case, be justified by circumstances of necessity, no such excuse could be pretended in this instance, since it would have

(c) Supra.

(d) 39 G. 3.
c. 80. § 39.

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have been an easy expedient for the purchasers to have sent the cargo for sale to some neutral island.

On the part of the claimants, Laurence and Swabey contended—That the statutes under which this ship and cargo had been condemned in the Court below, were meant only for the regulation of the ordinary trade of *British* merchants, and that they did not apply to cases of prize; that the purchasers, in this instance, stood precisely in the place of the original captors, and had interposed only for the purpose of bringing the prize to sale, which the captors themselves, being the garrison of *Goree*, were incapable of doing; that in this respect it differed materially from the case lately decided, in which the property in question was not prize property, but only the proceeds of prize, which had been acquired by the captors *in traffic* on the coast of *Africa*; that with respect to prize goods, under the Navigation Act (a), an exception had always been allowed in favour of captors, or those purchasing of them, under the advice of the law officers of the Crown (b).

(a) Sect. 15.

(b) Reeves on
Shipping, p. 254.

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JUDGMENT.

Sir *William Scott*.—This case comes by appeal from the Vice-Admiralty Court of *Barbadoes*, where the ship and cargo, being undoubtedly a *French* prize, were condemned for a breach of the revenue laws. It appears that the ship had been seized at *Goree* by the garrison of that place, who proceeded to take some short depositions, which were transmitted to this Court, and on which condemnation has since passed to the Crown, as of a prize taken by non-commissioned persons. The ship and cargo were sold on the coast of *Africa* to the present claimant, who sent them to the

the *British* market at *Barbadoes*. On their arrival, the Custom-house officer, looking only to the fact of importation, proceeded against them for a breach of the revenue laws, and on that ground they have been condemned, in the usual proportions, to the Crown, the Governor, and the actual Seizor.

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DAME CRUISE.

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On appeal, the sentence of the Court below is not sustained on the part of the Crown; but an appearance has been given for the Governor and the Seizor. The offence alleged to have been committed against the revenue, is stated to arise from an importation, contrary to the 26th (b) and 39th (c) of His present Majesty which prohibits the importation of slaves, except in ships fitted out in *London*, *Liverpool*, and *Bristol*. After some fluctuation of opinion, I am disposed to reverse the sentence of the Court below; though, at the same time, I think, that the Judge acted perfectly right on the facts which were in evidence before him.

(b) c. 60.
(c) c. 80. s. 39.

The ship and cargo were seized by the garrison of *Goree* as prize. The captors could not bring them in person to adjudication, for they could not move from their station; and it was impossible that such a cargo could find a market any where but in the *West Indies*. The more regular mode of proceeding would have been for those who purchased, and who may have been considered to have acted as agents of the captors, to have carried the vessel and cargo to *Barbadoes as prize for adjudication*. If they had gone there for that purpose, no question could have arisen respecting them. Because it being the case of a prize ship, neither the Navigation Act (d) nor the Middle Passage act would, in their ordinary operation, apply to it. But when

(d) 562. 15,

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(a) Sept. 10,
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the cause came on before the Court below; the vessel was in the hands of other persons than the captors, and no proof could be afforded that any proceedings of prize had any where been instituted.

It now appears from the records of this Court, that there has been a condemnation (a) regularly obtained in this Court, upon the depositions and ship-papers sent here, and upon claim given for the ship and cargo as the property of sundry persons of *Hamburg*, and therefore there is no longer any ground to impute fraudulent intention, or any culpable irregularity to the captors; although they might, perhaps, have proceeded in a more convenient manner. The intention of bringing the case to adjudication in this Court, could not be known to the Judge below, except by the assertion of the parties, on which alone he could not judicially depend. He was, therefore, fully justified in pronouncing the sentence which has passed.

But in the way in which I now consider the transaction, as a conversion, preceding the condemnation indeed, but rendered absolutely necessary for the purpose of bringing this particular cargo to its proper use; seeing that every thing has been done innocently, and without fraud, I am of opinion that these goods are to be considered as prize goods, within the protection of the law; and that there has been no importation in *contravention* of the Acts relied on, which can properly be deemed a violation of the law; I shall therefore decree the property to be restored to the claimants (b), on payment of the full expences which the seizer has incurred.

(b) The ship and cargo of 33 slaves was claimed for Mr. *Powell*, of *Liverpool*, and six slaves for an officer of the garrison at *Gorée*.

L'AMITIE, VILLENEUVE.

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1806.

THIS was a case of joint capture on the claims of two privateers, the *Lark* and *General Coote*, to share in the prize made by his Majesty's ship *Gannet*.

Joint capture.—
Claim on the
part of *privateers*
to share with
King's ships,
on what terms
maintainable.

In support of the claim of joint capture, Laurence and Swabey.—This is a claim advanced by two privateers, who were of force and size (a) sufficient to have effected the actual capture. It is, therefore, materially distinguished from those cases in which the Court has held, that the act of small vessels coming in sight of a chase, and dogging a ship of war which is in pursuit of a prize, shall not entitle a privateer to share as a constructive joint captor. In respect to the *Lark*, the claim is founded on the important fact of having been *previously* in chase. It is pleaded, and not denied, that she had been in sight of the prize from between four and five o'clock P. M. She had endeavoured to work to the northward in chase to come up with the prize. The capture took place about 7 P. M. and it is stated by one witness, *Baker*, who was on board the *Gannet*, having been pressed from the *General Coote*, that the *Gannet* did not make sail towards the prize, in consequence of the information received from the *General Coote*, till about

(a) The force of the several vessels was, the *Gannet*, 16 guns, 85 men; the *Lark*, 36 tons, 4 three-pounders, 14 men; the *General Coote*, 48 tons, 8 three and six-pounders, 26 men.—The prize 2 long four-pounders, 14 men.

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half past five. It has never yet been decided, that, in such a case, the mere intervention of a ship of war, making the actual capture, should defeat the claim of the privateer. It is not a case of mere constructive assistance, but of actual co-operation of the most unsuspicious kind, inasmuch as the privateer had indicated an intention, and had exerted her efforts, to make the capture, when alone, and before the King's ship came in sight. The chase was pursued, on the part of the *Lark*, to the moment of capture; but it is said, that she then disclaimed any interference, by omitting to send out a boat, and that she turned about, and steered off. The Court will perceive, that this conduct is not to be attributed to any intention of abandoning the prize, but to a very different reason. It is sworn, that the situation of the *Lark* was such, at the time of capture, as would have brought her within the range of the *Gannet's* guns, if she had approached, and that when the prize was secured, she declined to interpose farther, from fear of having her men pressed by the King's ship. It is established in evidence, that she had been in chase before, that she was in a situation to have made the capture alone, and that her only reason for not coming up, at the moment of seizure, proceeded from another cause, which will not affect the right to share. In no case has it been held that a joint captor is obliged to send men on board the prize. On the contrary, there have been cases in which the Court has pronounced for the joint interest, notwithstanding that no such precaution was observed. In the case of the *Eendraught*; March 14, 1788, that omission had

had occurred, through the claim of joint capture was sustained (a).

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On the part of the actual captor, the King's Advocate and Arnold adverted to the facts which had been fully detailed in the opening, and contended, that as to the *General Coote*, that vessel had never been in chase; that the pretensions on her part, were altogether so unfounded, as to entitle the actual captor to the costs of this proceeding on that claim. As to the *Lark*, no fact of actual assistance was shewn, sufficient to support a claim on the part of a privateer. If any intention had been entertained of attempting the actual capture, it had been abandoned by the *Lark*, which had failed away, and did not put in any claim till her arrival in port, when she heard that the prize, which was sailing under *American* colours at the time of capture, and might have been relinquished on that account, was, in fact, a *French* vessel, and a prize of considerable value. The circumstances relied on as an excuse for this conduct were, in some respect, untrue, and altogether insufficient. No apprehension could have been entertained from the guns of the *Gannet*, as there was only one gun shot fired, and that fell above a mile from the *Lark*. As to the fear of losing her men, it was in its nature not an excuse that could afford any justification. As long as the policy of the law recognizes the legality of impressing, a privateer is not at

(a) The argument as to the *General Coote* is here omitted, as the circumstances relied on, were of a very remote bearing, and are noticed in the judgment, which pronounces against the claim constructed on them.

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liberty to set up an apprehension derived from the legal liability of her situation, as an excuse for not doing an act which is otherwise required of her. If the privateer was at liberty, to avoid the occasion of falling in with the King's ship, the parties must at least choose between the two difficulties—either of incurring the risk to which they were by law exposed—or if they declined to come up, of taking that alternative, with the consequences attending it—among the rest, with the consequence of abandoning their claim of joint capture.

JUDGMENT.

Sir *W. Scott*—This is a claim on the part of two privateers to share in a prize which is admitted to have been actually taken by His Majesty's ship *Gannet*. The rule of law on this subject, which has been long established in this Court and the Court of Appeals, in various cases, is, that it must be shewn, on the part of privateers, that they were *constructively assisting*. The being in sight is not sufficient, with respect to them, to raise the presumption of co-operation in the capture. They clothe themselves with commissions of war from views of private advantage only. They are not bound to put their commissions in *use* on every discovery of an enemy. And therefore the law does not presume, in their favour, from the mere circumstance of being in sight, that they were there with a design of contributing assistance, and engaging in the contest. There must be the *animus capiendi* demonstrated by some overt act; by some variation of conduct, which would not have taken place, but with reference to that particular object, and if the intention of acting against the enemy had not been effectually

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tually entertained. The allegation, which has been given on the part of the *General Coote*, pleads to this effect :—" That that vessel had before taken a valuable prize, which she was conducting to the port of *Falmouth*; that she had many prisoners on board, and that her own crew was much weakened by the number of men put on board the prize; that information had been obtained from the master of the captured vessel respecting two other *French* vessels that were coming from *Martinique*, and that she pursued a course which tended at the same time to secure her prize, and was understood to be the track in which the *French* vessels were sailing; that about 3 o'clock P.M. the privateer discovered the prize, and determined to speak her, and accordingly continued her course, across which she must necessarily pass; that in so doing, the Master discovered an armed brig, and was at first at a loss to distinguish whether she was a friend or an enemy; that she afterwards proved to be His Majesty's ship *Gannet*, that the master was required to go on board; but that he excused himself, saying, that his crew was too weak to man his boat, but the brig then sent a boat for him, and carried him on board; that he then gave the captain of the brig advice of the vessels that he was looking for." The allegation then goes on to plead abusive language from the captain of the *Gannet*, and that he pressed two of the privateer's men, used much brutal menace and threats to take away their prize, and that such menaces deterred the master from pursuing his course, as he should have done, and by which he should have boarded the prize, before the *Gannet* could have come up.

Of this charge, there is no proof whatever. It is said in argument, as an excuse for the want of proof,

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that it is not easy to obtain evidence of a fact which passed in conversation only, and on board the King's ship. Whatever that difficulty may be, it is perfectly obvious that there must be some proof produced, and that the Court can pay no attention to such charges resting merely in allegation. The absence of all direct proof is rendered more conspicuous by the want of proof of any other kind, respecting which the same difficulty could not have occurred. There is no mention even of any declaration that the master made on coming on board his own ship, as it might be natural to expect, from the just feelings of indignation, that he would have complained of the ill-treatment which he had received. The whole charge is matter of averment merely, and it is the more material to dwell on this observation, because the allegation was admitted solely on the ground of alleged misconduct, on the part of Captain *Bass* of the *Gannet*.

If the charge could have been substantiated, it appeared to the Court to be improper that he should take a benefit from his own misconduct; and it might have given a colour to the case very different from that which it would otherwise assume. But the proof of this averment totally fails, and the conduct of the master of the privateer leads me to form a very different conclusion respecting it. All that can be advanced then in support of the claim of the *General Coote*, in the most favourable view of the case, is, that she had been pursuing her course towards the land, in the track in which the prize was afterwards taken. But where is the chase? There was no crowding sail nor any variation of route from that which would have been pursued, if no chase had been in contemplation. There was no overt act, from which the Court can
infer

infer any intention towards the prize; and I therefore do not wonder that the allegation should not have pleaded an actual chase. It pleads only, "that the master was prevented by the behaviour of Captain *Bass* from going on." I am clearly of opinion that there is no foundation whatever for a claim of constructive assistance. There is not one movement, that would not have taken place without any *animus capiendi*; it is therefore quite impossible for me to pronounce for an interest of joint capture on such a claim. But farther, as to costs,—A charge of misconduct has been alleged, which is not supported in any manner by proof; and I think that it is but reasonable that the party, who has been put to defend himself against such a charge, should be entitled to his costs.

The claim of the *Lark* stands on a more favourable footing. That vessel was on the look out in the Channel, at the commencement of hostilities, and it does not appear that her force had been weakened. It is not denied, I think, that she had been in chase; and with respect even to privateers, the act of chasing, if continued for any length of time, will be sufficient to found a title of joint capture. It will not be necessary that the joint chaser should actually board the prize; it will be enough if there is an *animus persequendi* sufficiently indicated by the conduct of the vessel, and not discontinued. Then the only question will be, whether the *Lark* had not given up the chase? For if the pursuit is prematurely abandoned, it certainly cannot be deemed a joint chase, at that moment, when the interest of capture is consummated. On this point, it is certainly a matter of no small difficulty, surrounded on all sides by releasing witnesses, to fix the moment

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of discontinuance, and to say whether it was at the time of capture or before. Under this embarrassment, I find some satisfaction in turning to the evidence of one witness, *Baker*, on whose testimony I think I can rely with more confidence, as he is a man who had been impressed from the *General Coote*, and was at the time of the capture on board the *Gannet*. His interest must be diminished by the admission of the claim; yet he states in his depositions "that the *Lark* was in chase at the time of capture, and had been in chase before, that her boat might have come up at the same time with the boat of the *Gannet*, and that she would have been able to have made the capture." In a case which turns on a point of considerable nicety, where the chase is admitted, and the only question is, whether the pursuit had not been discontinued, evidence of this kind is of more importance.

But it is objected, that there was no suggestion of interest set up at the time—and it is said that a boat should have been sent on board. It might for many purposes, be a measure of proper precaution, and of great convenience; and the want of it in this instance seems to have produced all the obscurity in which the claim is involved. At the same time, I do not know that it has been held to be a necessary ingredient in a title of constructive assistance, that a person should be sent on board, and a claim asserted immediately. I believe there have been many claims sustained, notwithstanding such an omission. It must be acknowledged, however, to be a measure of great convenience in all cases, and if the precaution had been observed here, the fact of joint chasing would in all probability not have been denied. I am of opinion
that

that the justice of the case between the parties will be, on a view of the whole evidence, to give the turn of the scale in favour of the claim of joint interest,—but at the same time to direct that so much of the prize shall be first deducted, as is equivalent to the expences to which the actual captor has been put, by the privateer's omission to assert an interest at the time of capture (a).

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VROW ANNA CATHARINA, MAHTS.

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THIS was a case on the demand of the captors, to have freight allowed to them for the cargo, or part of the cargo of coffee, claimed for merchants of *Hamburg*, and restored to them, and afterwards sold in this country, under a licence from His Majesty's Government.

Freight to captors, on suggestion of a beneficial and privileged sale in this country, not given.

On the part of the captors, Arnold and Swabey contended—That the case was distinguished from the

(a) In this case, on the reading of the evidence, the King's Advocate objected to the evidence of *Russell*, who, in his answer to the 6th interrogatory, had said, "that he cannot say he is not interested, inasmuch as he conceives he will be entitled to share if she is pronounced a joint captor, though he has signed a release."

Court. I have always understood the distinction in this Court to be, that if the witness says only that he expects to receive from the bounty of the captor, he is not incompetent, whatever deduction of credit he may be exposed to by that circumstance. But if he thinks himself entitled in law, he acts under an impression of interest, which renders him incompetent, however erroneous that opinion may be.—So ruled as to the expectation from bounty, in the case of the *Sans Jose*.

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(a) Vol. v.
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general rule, by this circumstance, that the claimants had adopted this country as the virtual port of destination, by the special application which had been made for permission to sell here. That it was in that respect a case analogous to the (a) *Diana, Runke*, in which a distinction had been allowed from the ordinary rule of law, on the ground of the intention of the proprietor to elect the markets of this country, as the place of actual destination; that the contract under the charter-party for a voyage from *Batavia* to *Holland* was in substance completed by this election to the advantage of the owners, and as the vessel would come into the hands of captors, deteriorated by the wear and tear of so long a voyage in the service of the cargo, it was but reasonable that the captors should receive some compensation from the owners of the cargo.

On the part of the claimants, the King's Advocate and Laurence—adverted to the general principle that had been so repeatedly acted upon, and denied that there was any reason to distinguish this case from the general rule. With respect to the accidental circumstance of a sale in this country, it was not more than usually took place in the disposal of goods which had missed their original market in consequence of being brought in. In *Mr. Constant's* case, he not only brought the goods to sale here, but settled in *London* as a merchant of this country, yet freight was not decreed. In the present case the demand was out of time, as the cause had been removed into the superior Court by appeal, and had been there finally disposed of, without any reservation of this question.

On the part of the captors, Arnold replied—That the objection as to time could not be pressed against the demand; since the application had been made in the Court of Appeal, where the answer given was, that the case was concluded there and remitted, and that the application must now be made in the Court of Admiralty.

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JUDGMENT.

Sir *W. Scott*—The Lords having permitted this application to be brought here, I shall not enter into the question of jurisdiction, but take it as granted, that the jurisdiction of the Court is well founded. The claim is given for the freight of goods captured on a voyage from *Batavia* to *Amsterdam*, and carried to *Liverpool*, where they have been restored and finally sold, under the permission of a licence; and the demand is founded on a suggestion, that they have been *sold advantageously* for the claimants in this country, and at their particular request.

The general rule is well known, being founded on very ancient principles of law, that whenever the captor brings the goods to the port of actual destination, he shall be entitled to the freight, on the ground that the contract has been fulfilled; but that in all other cases freight shall not be due, although the ship may have performed a very large part of her intended voyage, and so large a portion, as to raise at first sight an appearance of hardship and injustice in the refusal of freight, and to suggest a doubt, whether it might not be a better rule to allow a proportion of freight *pro rata itineris peracti*. But I am very certain that such a rule, if fully considered, would be found to be productive of much practical injustice, and

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would lead to endless litigation, and uncertainty, in the discussion of the particular circumstances that would be relied on in every case. The ancient rule of practice, therefore, is one to which the Court may be allowed to adhere with much rational bigotry. The only exception which has been admitted in this Court is that of the *Dutch* ships, in which the claimants, being *British* subjects, who were deeply engaged in bringing their effects from the *Dutch* islands, had made an affidavit, for the purpose of fortifying their claims, that it was their original wish and intention, that the property should have been brought to this country, but that they had been compelled, by the policy of *Holland*, to accept a consignment to *Dutch* ports. In these cases the Court did not look so much to the advantage that the claimant had derived, though there might be reason to presume that the destination was not *disadvantageous*, as that the delivery was made ultimately in the port of their original election. In Mr. *Constant's* case, there was no original intention to sell the goods here, but they were afterwards sold; and though he had himself fixed his residence in this country, the Court of Appeal did not think that circumstance sufficient to vary the application of the general rule.

In the present case there was no original wish to sell in this country. The cargo was brought in by force to *Liverpool*, and after restitution the claimants elected to sell there, combining many considerations of farther difficulty and expence in hiring other vessels to carry it on to *Holland*. The possible *advantage* or *disadvantage* of such an interruption of the original voyage, is but an accidental circumstance to which the
Court

Court will but slightly attend. It would introduce a labyrinth of minute considerations, through which the Court could not find its way. Sometimes the advantage would be on the side of the vessel, and sometimes on that of the cargo. I see no sufficient ground of distinction to support this demand, and therefore I reject the prayer.

The
VROW ANNA
CATHARINA.

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GAGE, MITCHELL, Master.

THIS was a question on the recovery of a *British* vessel, with a cargo of timber, &c. (a), which had been captured by a *French* privateer, but was found abandoned at sea, with a fire burning in her cabin, by the *Kite* sloop.

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Prize Act—
Construction—
rate of *salvage*
on recapture, if
binding in cases
of ships abandoned
by the
enemy.

On the part of the recaptor, the King's Advocate contended—That it was not merely a case of salvage on recapture, but that it approached rather to the nature of derelict, as the vessel was abandoned, and left at the peril of perishing by fire, as well as by the waves. That in such a case the Court would not consider itself restricted to the rate of *salvage* prescribed by the Prize Act, but would allow a larger reward as it considered itself at liberty to do in a preceding case (b).

(b) John and
Jane, supra
vol. 4, p. 216.

On the part of the *British* owner, Swabey Contended—That it was to be considered only as a case of salvage on recapture; that although it was not stated

(a) Value of ship and cargo as admitted, £1,002. 10s.

explicitly

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explicitly, that the enemy were seen to abandon the vessel, there were circumstances to shew *that* to have been the fact, as she was in company with an enemy's *sloop*, when the *Kite* gave chase. It was to be considered, therefore, as a case of compulsory *abandonment* by the enemy, and as such, agreeable to what has been decided in other cases, the salvor would be entitled only to his reward under the Prize Act.

Court.—What I shall do at present will be to pronounce for the rate of salvage due under the Act, since the salvors are unquestionably entitled to that. If, on farther information, it can be shewn to be distinguishable from other cases of recapture, I shall permit that question to come on again. If the case had rested upon the depositions alone, it would have borne the appearance of a case of derelict, because there is in them no mention of recapture. But the affidavit of the officer who brings in the papers, describes it as a *recapture*, and in that view the recaptors will not be entitled to more than the war salvage.

July 14, 1807.—This cause came before the Court again on the affidavit of the Master of the *Gage*, made at *Verdun*, he being then a prisoner in *France*. The affidavit stated only that his vessel had been captured, and that he had been taken on board the *French* privateer, and carried into *Calais*. It did not fix the time of abandonment, or establish the fact, whether the enemy were on board when the *British* cruiser was first descried, so as to shew that the prize had been abandoned on that account. On the contrary, in a letter from him of the 21st *February* 1806, exhibited

hibited on the former hearing, he appeared to have been altogether ignorant of the fate of his vessel. stating, "I was taken on the 24th *February* by a lugger, but I believe the *Gage* was retaken, and carried into *Dover*, but I cannot tell." Under these circumstances, the Court held the case not to fall under the restrictions of the Prize Act, and allowed a salvage of one-fourth (a).

THE WASHINGTON, WILLIAMSON,

April 18th,
1806.

THIS was a case on a demand for costs and damages against the captors, for losses sustained, by the ship being carried to *Jersey*, a place, as suggested, not fit for the reception of vessels of that burthen.

Instructions—
Interpretation
of the term
convenient
port; damages
pronounced.

JUDGMENT.

Sir *W. Scott*.—This is a question of damage sustained by a vessel coming from *Monte Video* to *London*

(a) So in the case of the *Lambton*, 29th October 1807, which was a case of a small *British* ship of 100 tons, found at sea by His Majesty's ship *Revenge*, without any cargo on board, and claimed on salvage as recaptured.

The officer belonging to the *Revenge*, the only witness examined, had said, "that the ship was found without any person on board; that there was a lugger to windward, which appeared to be a *French* privateer, and by which he believed she might have been captured."—The Court observed, that this representation had been given with great fairness, but that it did not amount to proof of the actual capture, and abandonment in the nature of a recapture; that the fact might not be so; and that under the inclination which the Court felt to extend the benefit of salvage in cases not restricted by the act of Parliament, it should decree one-fourth.

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as it turned out, with a large cargo, documented generally as belonging to persons in *America*, but of which a considerable part has been claimed for merchants in *London*. The vessel had sailed from the colony of the enemy after hostilities. Considering the general circumstances of the case, therefore, and that the property did not clearly appear, I am of opinion that the captors were justified in the act of seizure, and that it was not an unreasonable curiosity, on their part, to bring the question of property to judicial investigation, and to take the benefit of any question of law that might arise out of the facts. The original seizure therefore was in my opinion justifiable; and the question for the consideration of the Court now is, whether the vessel has been so treated in the custody of the captors, as to exonerate them from subsequent responsibility.

The first duty of captors according to the instructions, is, to bring their prize "to *some convenient port*." *Convenient* is a large and *general term*, leaving a certain latitude of *discretion*, but a discretion to be cautiously exercised, and with reference to the view, which the Crown itself must be supposed to have entertained in issuing the instructions. *Conveniences* are of different kinds some of a slighter nature, others almost indispensable. Among the *most important* must be considered *that* of bringing a vessel to a port where she may lie in safety, since that cannot unquestionably be deemed a *convenient port*, which does not afford security and protection to the property that is brought in. An open road for instance, where the ship may be occasionally exposed to the weather, cannot be a place of security. It is therefore quite impossible
that

that it should be considered as a *convenient port* for the preservation of property.

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Another material ingredient of convenience will be, that the port shall be of sufficient capacity to admit vessels to enter without unloading their cargoes, since it is the intention of the legislature that bulk shall not be broken. If there is not depth of water to allow vessel to lie without taking out the cargo, "*non erit hic locus*;" since captors are not to meddle with the cargo in any manner, without the authority of the Court, which cannot be exercised until the vessel has been brought into port.

It is also highly desirable, that the port should be a place which holds ready communication with the tribunals, which have to decide on questions arising out of the capture; that the parties may have access to advice, and may be enabled to obtain the necessary information; and that the directions of the Court of Admiralty may be carried into effect with dispatch. For all these purposes it cannot be supposed that *Shetland*, for instance, or *St. Kilda*, could be deemed *convenient ports*, for vessels that have to wait for adjudication in the Admiralty Court of *England*. These are the leading points of consideration, and may be deemed *indispensable*.

On the other hand, there may be *conveniences* of a subordinate nature, in *favour of the captor*, which may be also very deserving of attention when they do not interfere with those of higher moment. For instance, that owners of privateers may elect their own port, is but a reasonable advantage in itself, when kept within proper limits, and not suffered to predominate over the interests of other persons, and
more

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more especially over those general purposes of public justice, to which the Court is principally bound to attend. The privilege of electing their own ports, is a *convenience*, which may be allowed *cæteris paribus*; and it is one in which the Court will be disposed to support them, when it does not become the cause of greater inconvenience to others. But the just limits of this personal accommodation are to be distinctly observed; it is not an object to be pursued indiscriminately, for the mere profit of agency and commission, in neglect of other considerations of higher or more general importance.

In the present case, the port to which the vessel was carried, which was that of *Jersey*, is not altogether without objection, arising from a want of opportunity of intercourse with this Court; which renders it, in that respect, not *so convenient* for the general dispatch of business, as the out-ports of this kingdom. That inconvenience, however, if not increased by farther neglect of due diligence and attention to the general interests concerned, is not so great, as to induce the Court to over-rule the indulgence which has usually been granted to the privateers of that Island, and the neighbouring Islands, of carrying their prizes to their own ports. They are places of great martial enterprize, and of important service to the state, from their local advantages, and from their exertions in time of war. The privateers of these islands have in practice been always permitted to carry their prizes to their own ports, and therefore it is not to be said, generally, that it is not a proper exercise of the discretion reposed in them, or that they should be compelled in all cases to bring their prizes into the ports of this Country.

But there is enough, on the captors own shewing, to convince the Court, that the port of *Jersey* was, on other grounds, an improper port for a vessel of this description. It was a vessel of 900 tons, of a burthen beyond what that port was capable of receiving. It must have been obvious, that such a vessel ought not to have been carried there, or at least that she should not have been detained there, in opposition to the request so repeatedly made for her removal. She might have been taken to some port of *England*; or, what would have been *most proper*, on the information which was received, she might have been sent to *London*, which has turned out to be the place of her actual destination. I do not say that a privateer is bound to rest entirely on the veracity of the neutral master; because, if ships were to be released immediately, on the good faith of such representations, I am persuaded, the sanctity of that faith would be very frequently violated. But the assertion of the actual destination to *London*, might at least have suggested to the captors the propriety of making enquiries by their correspondents in *London*; and if by writing to *London* they had ascertained the truth of the asserted destination, it would have been expedient then to have acquiesced in the removal, on a just view of the convenience of all parties. For if such a state of facts had been presented to the notice of the Court, It would undoubtedly have held itself bound to order the removal, for the general benefit of the property concerned.

This ship, which I have said was not improperly seized, was carried to the port of *Jersey*; and the description which is given of that port is, “ that it is

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an open road, rather than a port; and that if it comes on to blow hard, or a strong spring tide, there is not safe riding there, the cables must be damaged, or the vessel will take the ground." It is perfectly clear then, that an open road could not be *a proper or convenient* port for a vessel of this description. The master had originally entered his protest against it, and had represented all the circumstances relating to the ship, in a letter which appears to be a well considered letter, and in which he strongly presses upon the captors the inconvenience and danger of suffering the vessel to lie there, in a port that was not a place of safety. So the fact has turned out. The captors themselves have brought in an affidavit of their pilots, and of their own surveyors, to shew that the vessel was not lying in a place of safety. But the inference which they drew from this representation of the port, is one in which the Court will find it very difficult to concur with them, *viz.* "that it was necessary that the vessel should be taken into the inner port, and for that purpose that she should be lightened and unloaded." On their own statement, the port was not answerable to the requisite which I have already pointed out, that it should be capacious enough to receive the prize, without breaking bulk. The conclusion to which they ought to have come was, *not* that the vessel should be taken into the inner port by first breaking bulk, but that she should have been sent to some other port, more fit for the reception of such a vessel.

They proceeded to unliver the cargo. Before the unlivery took place, they had received credible information that the vessel was really destined to *London*; because,

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because, before it was commenced, the master had requested them to wait till the packet arrived, as he understood that some negociation was going on. At that time, then, there was a reasonable call upon the captors to carry the vessel to some more proper port. They were not justified in inferring "*that she must be carried into the inner port,*" and for that purpose "*that she must be previously unloaded.*" I am clearly of opinion, therefore, that IN THIS they have done what they ought not to have done, and that there is cause of damage, to be referred to the registrar and merchants on these points.

Some other grounds of complaint have been alleged against the captors, as charges of *damage* occasioned by the loss of *some* of the crew who have deserted, and others who have been impressed. These are consequences which are in no manner connected with the act of carrying the ship to *Jersey*. They might have happened on her passage up the Channel, or in any other port. If an *American* vessel has *British* seamen on board, they will be liable to be taken out. It is also a probable consequence that they will withdraw themselves; but these are inconveniences which have no necessary connexion with the act of carrying the vessel to *Jersey*. I shall, therefore, dismiss these complaints. On the other parts of the case, I wish to repeat, that it must not be considered as an improper act of discretion to carry prize vessels to the ports of *Guernsey* and *Jersey*; but they must be such vessels, as are not unfit to be received there with suitable accommodations. It turns out, in this case, that it would have been infinitely more beneficial to all parties, captors as well as claimants, that the vessel should have been brought to some port of this kingdom, or, under

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the circumstances, to *London*. From the neglect of due precaution in this respect, loss has been sustained; and therefore I shall refer the question of damage to the registrar and merchants under the observations which I have made.

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Droits of Ad-
miralty.—Order
of Council,
6th March 1665.
Construction—
as to term acci-
dent, in respect
to the cause of
coming in.

THE MARIA FRANCOISE, LE BOURCH, Master.

THIS was a question of *Droits of Admiralty*, as to a *French* ship, which had sailed from *Europe* to the *Ile of France* prior to the declaration of hostilities in *March* 1803, and had been captured off *Pondicherry* by the *Fox* cutter, and carried to *Negapatam*, but had been released from capture there, by an order from the *English* Admiral of the station in those seas, and was lying in the road of *Negapatam*, when a second seizure was made, 7th of *September*, 1803, on the part of His Majesty's ship *Sheernefs*, who brought the prize to *England*, and proceeded to adjudication. On these facts appearing in the depositions, a claim was directed to be interposed, on the part of the Admiralty, as for a droit of Admiralty, seized in port subsequent to hostilities.

On the part of the Captor, the King's Advocate and Robinson.—This ship was seized by His Majesty's ship the *Sheernefs*, at *Negapatam*. The place of capture is represented by one of the witnesses to have been in the port, but that is not to be taken as conveying any precise description of the nature of the

the place. It is merely meant to represent the ship as lying at anchor off that town, or as it is expressed by another witness, "*in the port, and at anchor*;" that is, at anchor off *Negapatam*. It may be material that this fact should not be misunderstood, because, from the general description given of that coast, it appears to be nothing more than an open road, or mere anchorage ground, which extends for above two hundred miles along the coast of *Coromandel*. Of such a place it may be a question, on the authority of what fell from the Court on a former case (a), respecting a mere anchorage ground off *St. Marcou*, how far it would be sufficient to sustain the claim of the Lord High Admiral, so as to constitute a capture *in port*. There may not be any port there, in such a sense as will support rights of that nature. It is not necessary that there should. When those rights were first created, they referred to ports of a more distinct character, where the rights and duties of the Lord High Admiral were officially exercised. In such a place as this he could have had no representative to enforce his rights, nor any duties to perform. It is submitted, therefore, on this point, that the mere relation which a ship bears to a town by anchoring in an *adjoining roadsted*, will not answer the terms of the order in Council, so as to make such a vessel liable to be considered as seized *in port*. It may be a farther question also, whether the character of that settlement is such as can entitle the Admiral to any rights. The order of Council, 6th March, 1665, spoke only, in the first instance, "*of ports of His Majesty's kingdoms of*

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(a) Rebecca,
Thompson,
1 Adm. Rep.
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England and Ireland (a)." By a subsequent order, 24th March 1667-8, the same privileges were declared to extend "to all ports within the limits of His Royal Highness's commission of Lord High Admiral of *England*, and of Admiral of His Majesty's Foreign Plantations." Can it be said, that the mere mercantile settlement of the *East India Company* at *Negapatam* will answer this description? The rights of territory have never been conveyed. It is, therefore, on this ground also a place in which no rights can accrue to the Lord High Admiral under the terms of the order. But there is a third question, of more importance than either of the preceding, and one that may, perhaps, render it unnecessary that they should be pressed to any determination.—The order of Council of 6th March, (a) 1665, directs, "that all ships and goods belonging to enemies coming into any port, or creek, or road, of His Majesty's kingdom of *England* or of *Ireland*, by stress of weather, or any other accident, or by mistake of port, or by ignorance

(a) See vol. 1.
p. 320.

(a) It appears also that there had been a previous order of Council, Dec. 14, 1664.—"About ten weeks before the declaration of the war, respecting ships driven in by storm, or seized by non-commissioned persons, and taken into the possession of the officers, of the customs, to whom all prizes were then committed; by which order the King was pleased to direct, that the ships brought in by these accidents, should be restored to his Royal Highness, and to declare that they belonged to him as *bona inimicorum*, by virtue of his patent; directing those officers to meddle with those ships only as His Majesty's ships should bring in, and no other." This must unquestionably be considered rather as an act of grace and munificence on the part of the Sovereign, in favour of his Royal Brother, than as a distinction resting on any solid principle of legal construction.

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of not knowing of the war, do belong to the Lord High Admiral." This is a description of perquisites arising from casualties only, that are declared to belong to the Lord High Admiral; and it is submitted, that the line of distinction is, between such perquisites as are mere *casualties*, in the same manner as waifs and strays are perquisites of seignory on land, and such seizures as have their cause or origin in the exercise of hostilities, or in motives arising in any manner from a state of war. In this sense the following part of that order expressly declares, "but such as shall voluntarily come in, either men of war or merchantmen, upon revolt from the enemy, and such as shall be driven and forced into port by the King's men of war, and also such ships as shall be seized in any of the ports, creeks, or roads, of this kingdom, or of *Ireland*, before any declaration of war or reprisal by His Majesty, do belong to His Majesty." The circumstances leading to the seizure of this ship are clearly of the latter description; she had been captured by one of His Majesty's ships, and had been actually carried to *Negapatam* as prize, and, as may be collected, after the commencement of hostilities, though they were not known in that part of the world. The prize had sailed from *Brest* on the 15th *March* 1803, and had arrived at *Pondicherry* before the first seizure. She could not have been captured, therefore, till after the declaration of hostilities, 16th *May*, 1803. She was carried by the *Fox* to *Negapatam*, where the *English* Admiral, not knowing of hostilities, ordered her to be released. After knowledge of hostilities, she was again seized by the present captor on the 7th of *September*. This, therefore, is a case not only *not included* in the former part of the

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order, which it must be distinctly shewn, to support the rights of the Admiralty, but expressly excluded, and designated in the reservation of the latter clause.

On the part of the Admiralty, Laurence argued on the nature of the rights of the Lord High Admiral (a), and contended,

(a) The establishment of this office, and the nature of the profits assigned to it, seem to have undergone considerable alterations at different periods. Sir *Leoline Jenkins*, in his Report on the subject, adverts to the several species of perquisites which had become obsolete in his time. "It appears," he says, "by the Black Book in the Admiralty, (which certainly is anterior than King *Edward the Third's* time) that the Admiral, (for then there were three or four together) had their dues and perquisites established unto them in time of war. An Admiral had, while upon the King's service, by sea or land, 4s. a-day; if a Knight, 6s. 8d.; if a Baronet, 13s. 4d.; if an Earl, more, 100 marks a quarter, *pour regard de trente hommes d'armes*, those are the words, 2s. a-day for every Chevalier; 1s. to every Ecuyer, 6d. to every archer on board him. Besides, he had great shares (and the word shares is still in his patent) in all prizes, whether taken by ships in the King's pay, or by private adventurers. Other perquisites he had, not worth the mentioning, because proportioned to the rate of money, and to the tenuity of the times. The Lord Admiral hath, it seems, none of those petty perquisites at this day; yet it cannot, I think, be denied, but that he has a right unto them, or to something else in lieu of them, both *virtute officii*, and by the words of his patent, which gives him all the rights and emoluments of his place, in as full and ample manner as any of his predecessors enjoyed them. But how the appointment in the Black Book came to be disused, does not appear by any memorial that I can find in the Admiralty; If it were changed into tenths, as it was possible, in conformity to the *French* model, (where the Admiral, for his support, and in consideration of the dignity of his place, and the importance of his service, had, in the

(a) Edict. H. 3. year 1584, (a) *son droit de dixième*) It was then a right established, 17th April, 1584. not a new acquisition, and by edict confirmed unto him, not only of

contended, that the leading circumstances of this seizure were unquestionably such, as brought it within the description of an enemy's vessel seized in port subsequent to hostilities, a class of *prize*, which is declared to belong to the Lord High Admiral, on the solemn enquiry that was made into the nature and extent of his perquisites in 1665. It remains to be shewn, on the other hand, in what manner this particular seizure is distinguished from the general class. It is in the first place argued, as to the description of the place—that it is *not* a *port* in any sense that will support the claim of the Admiral. But there has been no case in which the claim of the Admiralty has been rejected on that ground. On all general reasoning, we must suppose that it would be sufficient that the ship was lying under the closest relation to the *town*, that the nature of the place admitted.—It was the usual place of anchoring for the trade of that town. As to the observations that fell from the Court in a former case, it is to be recollected, that they applied to a place totally different in this respect, since it was no *place of trade*; *St. Marcou*

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all prizes whatsoever, but of all prisoners too; and that *suivant les anciennes ordonnances*, as by the edict at large doth appear; and the benefit of this precedent, I conceive, was enjoyed by the *Prince of Orange* in the same kind." Vol. ii. p. 766.

Of these tenths, it is said, in another place, "there is no mention in the Lord High Admiral's Patent of these tenths, nor is there any uninterrupted custom alleged for them, except in the case of private men of war, from whom the Lord High Admiral does receive his tenths. That the Earl of Warwick had them given him by the late usurpers, from the *public* ships likewise, is yet fresh in memory; and that, after they had extinguished *the name and office of Admiral*, as much as in them lay (a), they sequestered the tenths as a distinct thing in the revenue of their *prizes*, and applied them to different uses from the rest,"—namely, for medals and honorary rewards (b).

(a) Scobel.

(b) 22 Feb. 1648.
—27 April 1649.

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was in that judgment described to be a place of temporary occupation only on the enemy's coasts, and as scarcely holding any connection with this country, except for military purposes. That fact is very different in the present case; for *Negapatam* is a regular settlement of the *East India* Company, and there was an *English* Admiral riding there at the time, by whose authority the former release was made. If it was necessary, therefore, that the Lord High Admiral should be represented by any officer acting under his authority, even that circumstance would not be wanting in the present instance. As to the description of the place, however, it is apprehended that a case has occurred in this Court, under similar circumstances, in which the same objection did not prevail. The *Mercu-*
rius (a) was condemned as a droit of *Admiralty*; yet the seizure was made in *Yarmouth Roads*, a place no more entitled to be considered as a port, than the anchorage ground, where this seizure was made. Then as to the other question, whether the possession of the *East India* Company is such a possession as would carry with it the right of the Lord High Admiral, which are declared under the order "to extend to all places within the kingdom of England." That has also been established, in the case of the *Indian Chief* (b), in which, on a question arising, whether foreigners residing in the settlements of the *East India* Company could be considered as resident in the *British* territory, the nature and condition of the territorial rights of those countries was discussed; and the Court was inclined to hold, that for purposes of this kind they might properly be considered as within the territory or dominions of the Crown.

(a) Adm. Rep.
vol. 1. p.

(b) Adm. Rep.
vol. 3. p. 12.

Crown (a). Then, as the last objection, it is contended, that such a case as the present is taken out of the former part of the order by the reservation of the latter clause. *That* does not appear to be the interpretation put upon this demand by the learned persons, who were engaged in the discussion which preceded the order. By the account of that discussion, extant in the works of Sir *Leoline Jenkins*, it appears, that the limitation suggested on the part of the Crown by the King's Advocate, Sir *R. Wiseman*, was, "that he would have it understood to be without prejudice to the King's men of war, if they should happen to be the first seizors." To which it is afterwards *subjoined* and approved as a reasonable restriction, "*provided (a)* *that men of war do make the seizure in pursuit of an enemy, putting himself into port, or else when they happen to meet an enemy as they are going out of port.*"—"And this restriction I do also submit to," says Sir *Leoline Jenkins*, "as very reasonable in the case."

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(a) Vol. 2.
p. 767.

This, then, is the interpretation which, it was then contended, ought to be put upon the several parts of this order. If a cruizer appears to be in any manner instrumental in driving the vessel into port, unquestionably it would be a harsh interpretation of the privileges of the Lord High Admiral to defeat the completion and success of a pursuit already commenced. But this is not a case of that description. The individual

(a) See also the *Angelique*, vol. iii. Appendix, p. 7, in which the national character of the claimants, *Armenian* merchants resident in *Madras*, was an essential part of the question, by which only they were affected with the penalty of trading with the enemy as *British* subjects.—In the writings of Sir *W. Jones*, it is to be observed, that in speaking generally of the condition and character of the inhabitants of the *British* possessions in *India*, he describes them as *British* subjects.—"Whence it should appear, that in all *India* there cannot now be fewer than thirty millions of *British* subjects."

Disc. x. Afat. Ref.

captor

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captor had no incipient merits to plead. The prize lay at anchor, owing to a cause which was, as to all parties concerned in this question, entirely *accidental*. On these grounds, therefore, it is submitted that this is a perquisite falling under the terms of the grant, and as such properly subject to condemnation as a droit of Admiralty.

In reply, the *King's Advocate and Robinson*, observed, that the case of the *Mercurius*, which had been mentioned as a seizure in *Yarmouth Roads*, was a seizure made immediately by the officer of the Admiralty. That the disputed interest in this instance was to be considered not as between one *grantee* and another, but as between the Lord High Admiral, and the crown, for whose interests the *individual captor* was to be taken as a trustee, under the temporary grants that are made to captors at the commencement of each war.

That the true point of distinction, under the order of 1665, was whether the *coming in* was *accidental*; and the whole question turned upon the meaning to be assigned to the term *accidental*, which was to be understood as relating not to the *individual captor* merely, but to the *original cause* of *coming in*. Whether it was owing to a *war-cause*, or *otherwise accidental* (a),
not

(a) Upon this distinction, a case almost contemporary with the order in question occurs in Sir *L. Jenkins'* letters, as to property *detained and arrested* in the Admiralty Court of *Jamaica*. It was the case of a *Dutch* ship, which had been captured before the war then existing, in *October* 1664, by a *French* man of war, on the coast of *Cuba*, and carried into *Jamaica*. What was the original ground of seizure on the part of the *French* captor is not explained, but it appears that he instituted proceedings against the vessel, and prayed to have it condemned to him, or at least to the amount of his expenses, and the damage sustained in the action.

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not absolutely, which could scarcely happen, but *relatively*, and with reference to the *war*. This *coming in* was *unquestionably* not accidental in that sense, and as such it was not within the meaning of the grant to the Lord High Admiral.

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Sir *W. Scott*.—This ship was taken as an undoubted French ship, and with a French cargo on board, and therefore both were unquestionably subject to condemnation. But when the case came before the Court

The Judge, on the 22d of November, 1664, sustained this prayer so far as to condemn the ship and lading, for the payment of 500*l.* to the Frenchman. The Dutchman appealed from this sentence; and Sir *Thomas Modyford*, as Judge of Appeal, decrees it to be null and void, and that the ship and her lading should be sold, “and that the proceeds should remain in such hands as he should appoint, for the use of the Hollander, in case there should be no war; but if a war should happen, then the same to be for the use of your Majesty, and his Royal Highness, in such case made and provided.” These are the words of the sentence which was given December the 9th, 1664. The first proceedings in the Admiralty of Jamaica bear date the 17th of November next before. The order for general reprisals against the Dutch, issued the 8th of the same month and year, and the war was declared in February following. The first question answered was, “that the Hollanders had no right to this money.” On the second, “Whether his Majesty, or else his Royal Highness shall have the money;” much reasoning is employed, in the course of which Sir *Leoline Jenkins* observes, in principle to the effect of this case—“that no seizure in port which is by accident, (and I reckon all seizures accidental to a war, or reprisals, that are not by your Majesty’s name and command), is by the regulation intended to enure to your Majesty’s use (a).” And in conclusion, “so that upon the whole matter, the seizure of the ship having not been by way of embargo, in your Majesty’s name, or by your warrant, but by a judicial decree between party and party, which was a mere accident to the rupture, then begun; and this seizure or ARREST (b) happening at a time when reprisals were actually issued out in England, I am of opinion, under correction, that the right to this money is vested in his Royal Highness, by virtue of his patent, and of the regulation 6th of March 1665-6.”—V. 2, p. 743.

(a) Page 743.

(b) i. e. by the Court of Admiralty

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in the first instance, something appeared in the depositions which shewed that there might possibly be an interest accruing to the Admiralty from the circumstances attending the capture. The Court therefore conceived it to be its duty to condemn only *generally*, and directed notice to be given to the officers of the Admiralty, in order to afford them an opportunity of sustaining such an interest, if it should appear advisable. It would indeed have been a gross dereliction of duty in the Court not to have used that precaution. Because it is the duty of every Court of Justice to take notice of all interests, that appear to result from the evidence before it, and not to suffer any persons to be precluded from asserting their just demands, from want of notice of any facts that may have transpired in the course of the proceedings, and may have come to the observation of the Court. If the original proceedings had been instituted on the part of the Admiralty, and it had appeared, that the individual captor might be interested, it would have been equally the duty of the Court to have preserved his rights, and not to have shut him out from an opportunity of interposing his claim. It was a most extraordinary proceeding on the part of the actual captor, that because the registrar had entered the decree of condemnation, without noticing the direction which was afterwards given for suspending it, upon the notice taken of these circumstances so appearing, a complaint should be raised against the King's Proctor, the officer of the crown, that he did not take advantage of a sentence so passed, and make a dishonest use of a mere act of inadvertency in the officer of the Court. The King's Proctor would have deserted his duty as a practitioner in the Court, if his conduct had not been exactly what it was; and the

the complaint against him is founded in a gross misconception of the nature of that duty (a).

We now come to the question of *interest*, whether this prize is to be condemned to the captor, or as a droit of office to the Lord High Admiral, or as that office is now constituted in practice, to the King in his office of Admiralty. It is well known that, formerly there was a Lord High Admiral, who now exists only in contemplation of law. All rights of prize belong originally to the crown, and the beneficial interest derived to others can proceed only from the grant of the crown. It was thought expedient to assign a certain portion of those rights, to maintain the dignity of the Lord High Admiral; but during the civil wars, those ancient grants had grown into obscurity: and it is observed by Sir *Leoline Jenkins*, that it had been the policy of the usurper to expunge, as much as possible, from record, the very name and office of Lord High Admiral (b) and all rights belonging to it.

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(a) These observations were thrown out in allusion to the former proceedings in this cause. On the facts above stated by the Court, the captor had considered himself aggrieved by not having the copy of the sentence delivered to him, and had directed an appearance to be given by his own proctor to assert his interest, in opposition to the King's proctor, in whose hands the care and management of the case was officially lodged. On a motion being made to that effect, the Court adverted to the circumstances of the case, and dismissed the application with strong disapprobation of the measures which had been pursued.

(b) The earl of *Warwick* was appointed Lord High Admiral by the Parliament.—He resigned under an ordinance that members should have no employments *April 15th 1645*.—Was appointed again by the Commons, *28th April 1645*.—Was deprived finally *23d February 1648*; under an ordinance that "that office and the wardenship of the Cinque Ports should be executed by the Council of State, appointed by the authority of Parliament." *Scobel, Feb. 23, 1648*.

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At the restoration, therefore, it became necessary to institute an enquiry into the nature of those rights, for the purpose of ascertaining their just limits. The discussion that took place respecting them is recorded in the works of Sir *Leoline Jenkins*; and I think it does appear from the history of that transaction, that the nature and distinction of those rights had been very much obliterated in the minds of those who might be expected to be best acquainted with them. For the opinions, that are reported to have been held by persons of eminence in this profession at that time, are in no trifling degree at variance with each other, and contradictory to the understanding which has now for a long time universally prevailed.

Very few passages from Sir *Leoline Jenkins* will be sufficient to justify this remark. In the first letter (a) on this subject, the right of seizure in port is supposed not to belong to the Lord High Admiral, *in prejudice of King's ships*, though nothing is more established now, than that such perquisites belong to the Lord High Admiral in exclusion of King's ships, as well as of others. It is said also (b), "that this right in port does not appear to be in the Lord High Admiral, to the prejudice of the King's own ships, either *by patent or prescription*;" which if taken separately, might appear to impugn a principle now most clearly understood, that these claims of special privilege, on the part of the Lord High Admiral, can have no other legal origin than the grant of the Crown. The meaning, however, which the words of that learned person, as explained by subsequent passages, were intended to convey (c), is not chargeable with any inaccuracy

(a) Page 765.

(b) Ibid.

(c) Sir *Leoline Jenkins* is to be understood as saying "that the patent granted only *bona casu fortuito reperta*, that the extending it

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(a) Page 767.

inaccuracy on this point, and therefore I dwell on this observation no farther, than may be necessary to obviate the danger of misconception on a subject of public importance. In the account (a) of the discussion which afterwards took place, this eminent person has recorded the traces of other opinions which it is not so easy to reconcile to the more correct view which is, I conceive, properly to be taken of this subject. He says, "*we all agree that His Majesty has not any interests in such ships and goods belonging to enemies, as are taken and brought in by any of His Majesty's subjects, who are not employed in the King's ships, or in private men of war.*"

But we differ only, in this circumstance. Sir R. Wiseman is of opinion that such ships and goods ought to be condemned to the taker; Sir W. Turner and my-

to *bona inimicorum*, was an extension of the grant by interpretation under the late regulations. In that sense, he explains himself, "*not by patent*, for the words *bona inimicorum casu fortuito reperta* do refer as well to the open sea (and then the admiral claims not against the King's ships) as to the ports." "*Not by prescription*, for in the two precedents, which is all I yet find of enemies goods seized in port and adjudged to the Lord Admiral, it does not appear by whom the seizure was made, in the one at *Swanney*, and it is express, the vice admiral made the other in the *Isle of Wight* (b)." So also in another place (c): His words are, "before this regulation be applied to the fact, it will, I suppose, be granted without difficulty, that there is nothing new granted to the admiral by this regulation, *only his patent is explained*, and his right, which was in part acknowledged in an order of Council December 14, 1664, is more expressly declared as to *bona inimicorum*. The Lord High Admiral has *bona inimicorum pro derelictis habita seu casu fortuito reperta* within his jurisdiction, granted to him by patent; and by the same regulation, March 6, 1665, his right is declared to extend to enemies ships, coming into port by stress of weather, or other accidents; so it is if they come in by mistake of port, or not knowing of the war."

(b) Page 765.

(c) Page 742.

Sir *Leoline Jenkins*, vol. ii. p. 742.
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self "*to the Lord High Admiral*" Here again is an opinion wholly untenable, in favour of *non-commissioned captors*, For that they should hold *any interest* to be vested in the taker, originally, and in opposition to the rights of the Crown, is so contrary to the true doctrine on this subject, that it shews, I think, most strongly, that all legal consideration of these matters had gone much into a state of desuetude, and it is not easy to reconcile the opinions there stated, with any view of the subject which we can now form, looking either to the general principles, on which alone such rights could originally be founded, or to the opinions which have, in later times, been universally entertained respecting them.

It is stated also in another place, " We agree, that enemies ships that come in *voluntarily* to His Majesty's ports, or are driven in thither by stress of weather, or other accidents, do belong to the Lord High Admiral, *if his officers or those of the Custom-house, or indeed any other do seize them.* This Sir R. Wiseman would have understood *to be without prejudice to the King's men of war;*" Whereas it is not now pretended, that they constitute any ground of exception whatever. He proceeds, " and Sir W. Turner is contented it should be so, *provided the men of war make the first seizure in the pursuit of an enemy; and these restrictions, he says, I do also submit to as very reasonable in this case.*" Not as collecting the traces of former practice, but asserting only what appeared consonant to the reason and equity of the case.

On all these points, it is impossible not to observe, that the opinions of those eminent persons, who are not to be named in this Court without great respect,
are

are so inconsistent, so opposite to the order made in Council, and the interpretation which that order has always received, that we are induced to conclude that they were speaking on a subject which had gone into some diffuse and consequent oblivion, and on which they had not refreshed their memories, by recurring to any traces that then existed of the more ancient practice; that their opinions can afford but little light for our guide in the present times, and therefore that the true rule must now be taken from the order of Council of 1665.

It appears to me, I confess, from the tenor of this order, that the distinction between the Admiral and rights of the Crown is founded in this—that when vessels come in not under any motive arising out of the occasions of war, but from distress of *weather*, or want of provisions, or from ignorance of *war*, and are seized in port, they belong to the Lord High Admiral; but where the hand of violence has been exercised upon them, where the impression arises from acts connected with war, from revolt of their own crew, or from being forced or driven in by the *King's ships*, they belong to the Crown. This is the broad distinction which is laid down in the order of Council, and which has since been invariably observed.

It is an opinion which I have occasionally thrown out, that the rights of the Lord High Admiral, though they are to be duly supported, are not to be extended by construction; and for these reasons, that the grants of the Crown differ, in this respect, from other grants, that they are to be taken strictly, and are not to be interpreted to the benefit of the grantee; and, secondly, that the rights of the Crown, being public rights, deposited there for great public purposes, are not to be alienated beyond the precise tenor of the grant. It

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is said, that the captors are grantees also, and that their claims stand, in that respect, on the same footing with those of the Lord High Admiral; but that description of them is subject to an essential distinction. In the first place, it is to be recollected, that the grant to the Lord High Admiral was made at a time when that office was on a footing which the present state of society and modern policy would scarcely suffer to exist. It is an establishment of ancient times, but little adapted to reasons of modern convenience. This at least we may presume, that if such an office was to be now instituted, some other mode of providing for its support would be resorted to than that of perquisites, which are so fluctuating in their own nature, which supply no regular fund for a permanent establishment, and are in no manner adapted to the exigences of the public service. The grant which is now made to those who by a commission execute that office, is accommodated to the necessities of the present times, and is directed under the view of the Legislature, attending to these present necessities, and to purposes of national concern.

Another distinction of rather a more legal nature is, that the grant to the Lord High Admiral, whatever it conveys, carries with it a total and perpetual alienation of the rights of the Crown. They are gone for ever, and separated from the Crown, and nothing short of an act of parliament can restore them; whereas the grant to captors, is nothing more than a mere temporary transfer of the beneficial interest; the Crown would not be chargeable with a violation of any public law, if it did not issue the grant; and though the practice of issuing it after the commencement of every war has been so constant

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in later times, as to authorize the expectation of the continuance, it still is to be considered as the occasional act of the Crown's bounty, by which not the right, but the mere beneficial interest of prize is conveyed for a time; but to return to the Crown and there to remain, till again conveyed by a fresh act of Royal liberality. Against such captors standing on an interest of that species, the construction is the same, as it would be against the Crown itself; because they cannot be pronounced against, without pronouncing in effect, that a perpetual alienation of the Crown's right to prize taken under such circumstances, had already been made to the Lord High Admiral.

Having premised these general observations, I come now to the matter of fact:—It is not very distinctly ascertained where the capture was made, since there are not less than three or four representations which by no means agree with each other. One *French* witness deposes, “that they were taken *in port* at *Negapatam*;” a second, “that they were taken at *Negapatam*,” the third states, “that they had been seized and brought to *Negapatam*, where they were released, and that after twenty days they were captured, whilst lying in the *road* of *Negapatam*,” that is *not in port*, but *in the road* of *Negapatam*. Then comes the account contained in the affidavit of Captain *Lind*, the actual Captor, “that she was seized three or four miles from the shore, and not within gun-shot, and that the road is no other than the common anchorage ground, which extends along the coast of *Coromandel* for two or three hundred miles.” These are four separate and contrary representations. On the question of locality, then, the description which is

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given of the place of capture is not so accurate as to enable the Court to draw any very satisfactory conclusions from it. With respect to captures *in roads*, generally, it must be understood, that to raise a question of this kind, a *road* must at least be so connected with the common uses of the port, as to constitute a *part of the port*, in which the capture is alledged to have been made. We all know that there are *roads* along many parts of the coasts of this kingdom, which make no part of any port. The port of *Tarmouth* is very different *from the roads of Tarmouth*; and I am not aware of any case in which a ship lying merely at anchor in a road, without being protected by points of lands, has been held to support a claim of this nature on the part of the Admiralty. It is not enough that ships should anchor there for a short stay. It must, I conceive, be the place where vessels not only arrive, but take up their station for the purpose of unlivering their cargoes, in the ordinary course of commerce. If it were necessary to decide on this point, I should be of opinion, that the exact nature of the place of capture was not so defined, as to enable the Court to pronounce for the claim of the Admiralty, in opposition to the general interest of the captor under the Prize Act.

Another topic which has been discussed is, whether this settlement could be considered as part of the *British* territories, being, as it is described, only a possession of the *East India* Company for the purposes of trade. On this point the inclination of my opinion is, that since the possessions of the *East India* Company have been so incorporated with the rights and interests of this Kingdom, the claims of the Lord High Admiral would extend to them, and would attach on seizures made in that part of the world, as well as in other ports.

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ports. This is a question, however, which has not been directly decided, nor perhaps ought it to be, until some case occurs, which may render it necessary to consider fully and with due deliberation all the consequences, that may be involved in it. The only point which remains to be considered is, that on which I have already made some observations, viz. that this ship did not come into port through ignorance, or under inducements *unconnected* with exertions of a military nature, but that she was *driven or forced* in by one of His Majesty's ships. This is what appears to me to be specially reserved in the order of Council. It is the case of a ship not only *driven* in, but *brought* in, *upon conjecture of war*, when hostilities *existed*, but were not certainly known. She was on that account released, and seized again within about twenty days, when the existence of hostilities was no longer a matter of conjecture. Under these circumstances unless I could apply a more liberal interpretation of the Lord High Admiral's grant, than I conceive myself warranted to do, I must hold the right of prize to be in the King. I am of opinion, that it is a case, not only *not* within the words of the grant to the Lord High Admiral, but that it is *that* which is specially reserved to the Crown, and consequently that the condemnation ought to pass to the captor.

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Prize Interest
under the pro-
clamation—
Claim of Lieu-
tenant *Nicholas*
of His Majesty's
ship *Niger*, but
a *passenger*, and
doing duty by
request on board
the *Tribune*, not
sustained.

THIS was a question of interest, on the claim of Lieutenant *Nicholas*, of His Majesty's ship the *Niger*, to share in the prize captured by the *Tribune*, on a suggestion that he was a Lieutenant in His Majesty's service, and actually doing duty as Lieutenant on board the *Tribune* at the time of capture.

The case was argued on the special matter (a),
by

(a) The affidavit of Lieutenant *Robert Nicholas*, stated, "that on the same day that the situation of Lieutenant became vacant, the same was filled by the deponent by Captain *Bennett's* orders, who expressed himself in words, or to the effect following, viz. "Mr. *Nicholas*, your services are now become necessary, you will therefore keep watch;" and an exhibit was introduced, as a certificate given by Capt. *Bennett* to the appointment and service.

"These are to certify that Lieutenant *Robert Nicholas* of His Majesty's Ship *Niger*, served by my order as Lieutenant on board His Majesty's ship under my command, from the 28th day of December 1804, unto the date hereof."

For Lieutenant *Robert Nicholas*, } 12th day of February, 1805,
of H. M. S. *Niger*. } (Signed) R. H. A. *Bennett*."

On the other side, the affidavit of Captain *Bennett's* was introduced, stating, "that the deponent had no authority to increase the number of lieutenants, contrary to the service, and to the prejudice of the regular number of lieutenants allowed, and that he would not have granted the said Lieutenant *Nicholas* a passage to *England*, on board the *Tribune*, in prejudice of his own lieutenants."

"That the loss of the master of the *Tribune* was not replaced by Lieutenant *Box*, it not being in the power of the deponent, who then was and still remains captain of the said frigate, to reduce him to that rank; and that the said Lieutenant *Box* continued

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by *the King's Advocate and Laurence*, on the part of Lieutenant *Nicholas*; and by *Arnold, Swabey, and Robinson*, on the other side, to the effect of the observations occurring in the judgment.

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JUDGMENT.

Sir *William Scott*.—This question comes on after a delay, which, wherever the demerit of having occasioned it may lie, will not, I hope, occur in any other cases. It arises on the claim of Lieutenant *Nicholas* to share as lieutenant of His Majesty's ship the *Tribune*, he being a lieutenant of His Majesty's ship the *Niger*, but on board the *Tribune* for the purpose of taking his passage home, and doing duty at the request of the commander when the prize was taken; and I must confess, that if it had not been pressed with great earnestness by persons to whose judgment I am always disposed to pay great respect, I should not have thought that there was any very serious question in the case. For neither the original case, as it presented itself to

to be a lieutenant, and in no inferior station in His Majesty's said frigate."

"That upon the loss of the master, it became necessary that some person should mark the log, &c. but that the so doing does not constitute the person doing it as the master of the said frigate; neither, was the said Lieutenant *Bow* in fact so considered, nor did this deponent mean or intend such construction should be put upon his doing that part of the duty required of him."

"And he lastly made oath, that the certificate given by him to the said Lieutenant *Robert Nicholas* of His Majesty's ship *Niger*, was intended as a matter of future recommendation, and not to support him in any claim to share with the Lieutenants of His Majesty's said frigate *Tribune* in any prize or prizes taken by her."

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my mind, nor the observations which I have heard would, independent of that earnestness, have made any impression upon me. The opinion which I have formed, may be incorrect; but I fear it is invincible, and must be left to be corrected by the decision of the Superior Court, who will have the means of forming a more exact judgment, on the interpretation which is to be given to the instruments, on which this question depends.

It appears that Lieutenant *Nicholas* was coming to join his ship, the *Niger*, and that he had been received on board the *Tribune* as a passenger, with great civility, as well by the captain, as by the lieutenants of that vessel, since the captain did not receive him without applying for their consent, as it might be attended with some encroachment upon their personal convenience. They consented, however, with great kindness, to receive him, and also his friend, a military officer, into their mess, and accommodated them in their cabin; and certainly it is highly expedient that such accommodation should be afforded to officers in the public service. Whether the chance of having such consent made the ground of a demand of this nature, will tend in future to induce persons to grant civilities of this kind more readily, may be a question.

The case has been argued on the provisions of the Prize Act, and the proclamation on which alone my judgment can be founded. As to any remarks on the hardship of such a case, it will be sufficient to observe, that no case that depends upon the operation of an universal rule, can properly be considered as a *hardship*, because the party will have the benefit of the rule in
his

his own turn. There may indeed be cases which on the first view may appear to carry hardships with them, as the case of the *Cabadonga* (a), perhaps, where all the parties had been long associated in a common service, and where the crews had been incorporated, and where an engagement had been sustained attended with great personal danger. That case would in general language be termed a hard case. But there has been no such danger sustained here; and no particular ground for a *complaint of hardship*.

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It has been contended, that it would be most unjust and illiberal, that Lieutenant *Nicholas* should be permitted to serve, without being allowed to partake in the prize. But from all the enquiries which I have been able to make from experienced and respected persons in the Navy, I am informed, that it would have been an illiberal and churlish thing, if an

(a) The *Nuestra Señora de Cabadonga* was a case of a prize taken by the *Centurion*, on board of which ship were several officers of His Majesty's ships the *Gloucester* and *Trial Prize*. These two ships had been associated with the *Centurion*, in a voyage of discovery under Lord *Anson*, but had been *destroyed* during the voyage, as no longer sea-worthy. The decree of the Court of Admiralty had pronounced "that these officers, were officers in His Majesty's service on board the *Centurion* at the time of capture, and adjudged them to share respectively according to their ranks with the officers of the *Centurion*."—8th *March* 1745. Book 2. fo. 228

On appeal this sentence was reversed, and it was decreed, (a) "that they *were not* commissioned or warrant officers of or belonging to the *Centurion*, nor in pay as such, nor aiding or assisting as officers of or belonging to the *Centurion*, at the time of capture; and that they have not any right to share in the distribution of the prize money with the officers." See also, 1 *Douglas* p. 326. where the circumstances of this case are stated.

(a) *Lords*,
17th *May* 1747.

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1 Douglas,
p. 326.

officer so received on board another ship had not offered to contribute his assistance, in return for the accommodation which he had received. The proclamation and the Prize Act lay down two requisites as necessary to entitle a person to share; that the officer should be not only on board, but that he shall be also an officer belonging to the ship. This is the obvious, and likewise the decided meaning of the clause; and Lord Mansfield in *Wemys v. Linzee* states it to have been judicially determined, "that the officers must *not only be on board, but belonging to that ship*;" and therefore the only question is, whether this gentleman could be considered *as a lieutenant belonging to the Tribune*? On what ground can it be contended that he was? It is said that there was a vacancy, and that the captain might appoint a lieutenant. On some stations the Commanding Officer (a) may have a right to appoint to vacancies, and if the appointment is confirmed by the Admiralty, it may be a question how far that confirmation would act retrospectively, so as to give the person a legal right to all the profits of his new situation from the moment of such appointment. I should be disposed to hold that it would; though it does not occur to my recollection that there has ever been a claim of persons so situated decided, or brought into discussion, in this Court. It is sufficient to observe, that the question cannot be raised in this case, because here was no *vacancy* among the lieutenants; and nothing can be clearer, than that the captain could not remove a lieutenant, so as *to create a vacancy* by his own authority.

But we have the most convincing testimony that there was no such intention. The whole of the case

(a) Vide infra p. 310.

seems to have been built on a wrong interpretation of the nature of the certificate which had been given by Captain *Bennett*. I am informed that it is, as indeed it must be, a very constant practice in cases of indisposition, or on other occasions, for one person to do duty for another, but, that the person so acting, does not on that account cease to continue in his own character. In this instance, Lieutenant *Box* might act as master, but he did not cease to be lieutenant. It was not in the power of Captain *Bennett* to degrade him; he might suspend him for misconduct, but he could not transfer him to a subordinate station. Indeed we have the best evidence on this point in the affidavit of Captain *Bennett*, guaranteed as it is in the strongest manner by his want of authority. To produce any such effect there must have been an entire transfer of Lieutenant *Box* to another office, before his own could be said to be vacated, or could become an appointment, liable to be conferred on another person. If we are to look to any vacancy, it was the office of master that was vacant; and if Lieutenant *Nicholas* had been appointed, as it is called, or requested to do duty as master, I should not have held that he would have been entitled to share in that character; because he could not, in my apprehension, be so appointed, since he was a lieutenant in another ship, and it was not in the power of the captain to alter his relation to the naval service of the country.

The mere performing the duties of an officer (a) would not necessarily confer the benefit and emoluments of that office. The important consideration will

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(a) *Lumley versus Sutton*, 8 Term. Rep. p. 224.

be,

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(a) On a new
trial, 1 Douglass,
p. 328.

be, whether he comes into the office by the mode which the law prescribes to confer the right and interests of the office. These are the observations which suggest themselves on the facts of the case, and I think they are fully supported by the doctrine of decided cases. In *Wemys v. Linzee* (a) the question is reported to have terminated finally in a verdict that the plaintiff had not acted in the capacity alledged. The duty had not been performed. It will not follow, however, that if it had, the demand could have been sustained. But the case of the *Cabadonga* does, I think, furnish a complete decision on the general law, and is clearly applicable to this case. On the whole, I am of opinion, that there was no vacancy but that of master, to which Lieutenant *Nicholas* could not have been appointed. We have it from Captain *Bennett* himself not only that he could not appoint him to be lieutenant on board his ship, but that he had no such intention, and that he would not have received him on board, if he had supposed that it could have interfered in any manner with the interests of his own lieutenants: and that the certificate which had been relied on, was meant only as an expression of the general courtesy and kindness; with which this gentleman had been all along received and treated. With the most perfect conviction of mind, I decide against this claim, and must leave it to be corrected elsewhere, if the opinion which I have formed should be erroneous,

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ALESSANDRO, Master.

March 29th,
1808.

IN this case a question of a nature, in some respects similar to the last, and for that reason introduced here, far out of the order of dates, was brought before the Court, on the claim of Mr. *Samuel Whiteway*, to share as acting Lieutenant on board the *Agamemnon*, in a capture made by that vessel, on the following facts, as set forth in the act.

Prize Interests
under the pro-
clamation—
Claim of Mr.
Whiteway to
share as lieu-
tenant, as ap-
pointed by the
captain of His
Majesty's ship
Agamemnon "to
act as lieute-
nant" not sus-
tained—See
circumstances.

The *Agamemnon* being a ship belonging to Admiral Sir *J. Orde*'s squadron off *Cadiz*, on the 8th of *December*, 1804, received orders from him to cruize for fourteen days off *Cape St. Mary*, at the distance of about 75 miles, and then to return. On the day before the ship parted from the squadron, Sir *John Orde* took to his own ship two of the lieutenants belonging to the *Agamemnon*, putting on board a gentleman of the same rank from another ship, but leaving a vacancy of one lieutenant on board the *Agamemnon*. Captain *Harvey* considering himself to be completely detached, did on the following day, and when totally out of sight, and deeming it requisite for the due performance of the duty, appoint by warrant Mr. *Samuel Whiteway* to be acting lieutenant on board the *Agamemnon*. Mr. *Whiteway* served in that capacity during the cruize on which the prize was taken. When the vessel rejoined the fleet, the Admiral approved of what had been done, but did not confirm the appointment in any manner, but appointed another gentleman, and took Mr. *Whiteway* on board his own ship, in order to promote him on some future occasion.

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On the part of Two Gentlemen, Lieutenants of the Agamemnon, opposing this claim; the King's Advocate and Adams contended, that the appointment set forth in the act. was not sufficient to support the interest under the proclamation, which looks to the qualification of persons under their commissions from the Admiralty, and not to the situations which they may accidentally fill on particular occasions.

That the power of appointing officers to supply vacancies was entrusted with great caution, and under great restrictions, by the Board of Admiralty. That with respect to captains or superior officers (a), They were empowered by the naval instructions to appoint only in case of death, or very urgent necessity. Even Commanders in Chief when they have a power of appointment inserted in special terms in their commissions, were restricted from exercising it, in certain latitudes, where they might have an opportunity of recurring to the Board of Admiralty (b). That it was in fact a

(a) " If a commission or warrant officer of any ship shall die, and the service should require that another should be immediately appointed, the senior captain present is to appoint a proper person to act, until the pleasure of the Admiralty, or his commander in chief, shall be known; but no other than the commander in chief shall appoint to any vacancy occasioned by any other cause than death; unless, from some extraordinary circumstances, the number of officers in a ship be so reduced as to make it absolutely necessary to appoint others."—Naval Instructions, sect. 4. c. 2. art. 24.

(b) When a commander in chief is authorized to appoint officers to vacancies, which may occur in the ships under his command, he is never to exercise that power while in the Channel Soundings, or in the North Sea, or the Baltic, or on any of the coasts of the United Kingdom; but he is to inform the Secretary of the Admiralty of all vacancies that may happen, that the Lords Commissioners of the Admiralty may send officers to fill them, or give such directions respecting them, as they may think fit; but he may appoint proper officers to act in those vacancies, until the pleasure of the Admiralty shall be known."—Ibid. art. 2.

power

power but rarely exercised; that Sir *Edward Berry* went into action in the memorable engagement of *Trafalgar*, and on another occasion, in the presence of the commander in chief, without having his complement of lieutenants filled up. That if captain *Harvey* could, under any circumstances and when independent of any superior commander, exercise such a power, this was not a case of independent service, but of a temporary absence only, under the immediate direction of the admiral, who had not confirmed the appointment, neither was Mr. *Whiteway* a lieutenant at the present moment.

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On the part of the claimant, Arnold and Phillimore referred to the warrant (a) of appointment, and the

(a) The appointment was in these terms:

"I do hereby constitute and appoint you acting lieutenant of the said ship, willing and requiring you to take upon you the charge and command of acting lieutenant in her accordingly; strictly charging and commanding all the officers and company belonging to the said ship subordinate to you, to behave themselves jointly and severally in their respective employments, with all due respect and obedience unto you their said acting lieutenant, &c.

"And for so doing, this shall be your warrant.

"Dec. 9, 1807.

(Signed) JOHN HARVEY."

To Mr. *Samuel Whiteway*,
hereby appointed to act
as lieutenant of H. M. S.
Agamemnon, until further
order.

Captain *Harvey's* affidavit farther stated,—“That by the regulations of the service, an admiral or commander in chief, when at a distance from immediate communication with the Commissioners of the Admiralty, has full power and authority to supply such vacancies as may happen on board of ships under his command, and notwithstanding such promotions may not be afterwards

confirmed,

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the explanation given of that act in the affidavit of captain *Harvey*, and contended that Mr. *Whiteway* was entitled to share as lieutenant in the prizes taken during the time that he served in that capacity.

He had been appointed to act as lieutenant by competent authority, and had been received in that character, he had done duty, and been borne upon the books, and had received pay as such, and would no doubt have been liable to be tried by a court-martial for any neglect of the duties of that appointment.

JUDGMENT.

Sir *William Scott*.—This is a question whether Mr. *Whiteway* is to be considered as a sea lieutenant, so as to share in the prize taken by the *Agamemnon*, under the circumstances which have been represented.

It is alleged, that at the time when the appointment was made, the *Agamemnon* was *separated from and out of sight of the fleet*; but I cannot accede to that description. Separated from the fleet she might

confirmed, yet the persons so appointed receive the pay of the situation for the time they filled it, and such persons are also always considered entitled to share in that class of officers with which they are so acting, in all prizes during that period. That he has always understood, that in cases of one or more ships detached from a squadron on a special service, such as the *Agamemnon* was, and where the great distance precludes communication, the commanders of those ships are considered as possessed of similar authority, and have exercised it, and that he hath never understood that the right of officers so nominated had ever been called in question, so far as regarded prize money, but that they have always been deemed entitled to share in that class of officers with whom they acted, in performing the duty of the ship when the prize was captured."

be,

be, but not from the Commander in chief, so as to be independent of his authority. On the contrary, it appears that captain *Harvey*, on his return, reported to the admiral what had been done, for his approbation. The admiral would undoubtedly be entitled to share in all prizes made by the *Agamemnon* during the cruise; and so far was this vessel from being *completely separated* from the command, under which she had been placed, that she is not to be considered as separated, in any manner, to any legal effect whatever.

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The powers or privileges that may belong to a captain or senior officer, entirely detached and independent of a superior command, cannot, with propriety, be attributed to captain *Harvey*, who was *not* so detached; and I may put out of the case all instances of appointments made by captains of independent ships. This is not a case of that description, and I am, therefore, not called upon to lay down the rule for such cases with any measured consideration. It may be very necessary or proper, that persons so situated should be entrusted with such a power, without affecting in any manner the question immediately before me.

On the return of the *Agamemnon*, captain *Harvey* reported the appointment to Sir *J. Orde*, who expressed some approbation of what had been done; but he did not confirm the appointment, because he immediately removed Mr. *Whiteway* to his own ship.

On these facts two questions may be raised, first, what was the intention of captain *Harvey*, that intention being gathered, not from what has been introduced since in evidence, but from the tenor of the warrant? and secondly, supposing that intention to have been absolute, whether captain *Harvey* had any such power, so as to confer on the person appointed a right to share

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in prize under the proclamation, on which alone my judgement must be formed? Looking at the instrument alone which purports to appoint Mr. *Whiteway* to be *acting lieutenant*, I should be disposed to consider it as an appointment only for occasional and temporary purposes, "I appoint you *acting lieutenant*." At the same time, if it is the form in which other appointments are usually made, I should be sorry to lay much stress on that observation; and if we look at the terms, in which captain *Harvey* speaks in his affidavit, it is rather to be inferred, that his intention was to confer the appointment in the fullest extent to which he was competent.

Then comes the second question, whether captain *Harvey* had the *power* of making the appointment, so as to convey an interest under the proclamation? Some circumstances have been thrown in as auxiliary to this demand, as that there is a sort of *courtesy* in the navy, which countenances the practice; but that will not be sufficient to controul the terms of the proclamation, and the construction which properly belongs to them.

It is said also that the Lords of the Admiralty have allowed the pay, which may signify their approbation of the services of this gentleman. But it appears that this is a discretion which is exercised on occasions of this kind with various result, sometimes allowing such payment, and sometimes withholding it. If there is any instance in which it is refused, it shews that it is to be deemed an act merely of liberal consideration, in the case where it is granted. It may be observed also, that there are no adverse interests to be affected by an allowance of that nature. It rests entirely between the individual and the public, where the Lord High Admiral, representing

senting the public, may be authorized to exercise a more extended liberality in rewarding particular services, at the same time that such approbation would be very improperly made the test, or foundation, of a legal demand.

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It is argued, that a person under this appointment would be subject to a court-martial for neglecting the duties of the office. The necessities of the service may render him liable to such orders, and amenable to the ordinary jurisdiction, in case of disobedience. But that he becomes *liable as a lieutenant* is not I think an accurate description. It is begging the question to state it in that manner; because to be liable to be tried as a lieutenant, he should be liable *to be punished as a lieutenant*, that is, to be *broken as a lieutenant*, which in fact he could not be, since he was not a lieutenant, and is not a lieutenant at this moment. That plea therefore will not avail. It is then said, *that he messed as a lieutenant*. But even that privilege, were its importance much greater than it is, appears by one of the affidavits to have been granted to him as a guest, and in the way of accommodation, rather than as a person contributing his proportion as matter of *right*, and under the ordinary regulations of the *service*. That he was borne on the books, and put on the prize lists, are acts of Captain *Harvey* only, and though they are strongly indicative of the opinion, which that gentleman entertained of Mr. *Whiteway's* situation, and of his disposition to serve him, they can have but little effect in ascertaining his legal character.

Under a consideration of all the circumstances set forth in the act, I do not conceive that I am warranted to pronounce, that Mr. *Whiteway* was appointed *a sea lieutenant*, so as to be entitled to share in that character under the proclamation.

THE WILLIAM, HASTIE, Master.

Dec. 17th,
1806.

*Damage against
the captor, ow-
ing to a defect
of due diligence,
in not having
taken a pilot
on board, &c. re-
stitution in value.*

THIS was a case of a demand for restitution *in value*, for a ship and cargo lost in going into *Guernsey*, owing to a want of due skill in the Prize Master, who had refused to take a pilot on board. As it was a question depending in great measure on points of nautical skill and experience, the Court was attended by two Gentlemen from the Trinity House. On the opening of the case,

The Court observed—Gentlemen, I will, in this stage of the case, take the liberty of stating to you the principles of law which govern cases of this description. When a capture is not justifiable, the captor is answerable for every damage. But in this case the original seizure has been justified by the condemnation of part of the cargo. It is therefore to be considered as a justifiable seizure, in which all that the law requires of the captor is, that he should be held responsible for *due diligence*. But on questions of this kind, there is one position sometimes advanced, which does not meet with my entire assent, namely, that captors are answerable only for *such care*, as they would take of their own property. This, I think, is not a just criterion in such case; for a man may, with respect to his own property, encounter risks from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable, in respect to the custody of the goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person, by one who is, or may be supposed to be, acquainted with his character, the care which he would take of his own property

property might, indeed, be considered as a reasonable criterion. But in cases of capture, there is no confidence reposed, nor any voluntary election of the person, in whose care the property is left. It is a compulsory act, of *justifiable force*, but still of such force as removes from the owner any responsibility for the imprudent, or incautious, conduct of the Prize Master. It is not enough, therefore, that a person in that situation uses as much caution as he would use about his own affairs. The law requires that there should be *no deficiency of due diligence*. And this is the point, which you will have to determine on the evidence which will be laid before you, with respect to the loss of this vessel, which struck upon a rock, and went down in mid-day, without any change of wind, or any accident imputable to the state of the weather. The question will be, whether the rock on which the vessel struck, was such as ought to have been known to persons pretending to be acquainted with the navigation of that port? one of the objections being, that the prize-master did not take a pilot on board (a).

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The

(a) In the case of the *Portsmouth* (a) and other cases, on (a) 5th June 1807. questions of loss or damage sustained in the navigation of prize vessels, The Court of Admiralty has considered it to be a principal test of *due diligence*, whether the prize-master had availed himself of the ordinary opportunities of taking a pilot on board? In the *Portsmouth*, The Court, after a discussion of evidence applying to the accident observed, "As to the question of legal responsibility it appears, that there was a regular pilot on board, to whom the care of the navigation of the vessel was necessarily confided. If persons under him do their duty, and it is not shewn that the cause of damage arises from want of obedience in them, or from any cause assignable to the want of that controul, which the captor is bound to exercise over the crew, I am of opinion that the captor

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The case was argued on the facts by the *King's*, *Advocate* and *Jenner*, on the part of the captor, and by *Laurence* and *Adams* for the claimant.

JUDGMENT.

Sir *W. Scott*.—Gentlemen, you have now heard the affidavits read, and the arguments of counsel upon them, and I shall not think it necessary to detain you with any remarks from me. The Court has decreed the restitution of the ship, and parts of a valuable cargo. The captors have pleaded in discharge of that decree, “that the vessel was *lost* at sea, without any fault or misconduct on their part.” It lies on them to establish that fact, and if it is not proved, the responsibility will fall upon the owners, though they

is exonerated. This is a rule, which the Court has applied in several cases, and the only objection that I have heard made to it is, that it may be a grievous hardship on the owner, to have the responsibility for the loss of a valuable ship turned over to a pilot, who may be in reality a person of no substance. But upon what different grounds do all other branches of navigation depend. It must happen to *East India* ships, and to valuable cargoes of all descriptions, to be confided to the care of pilots in the same manner, and on the same conditions. I see nothing, therefore, in this plea of hardship, that should justify a distinction, or throw back the responsibility on the captors, who were, in no degree, the cause of this misfortune, and who were chargeable with nothing but the appointment of one of the established pilots of the river, of whose qualification they were not judges; and as to the particular person employed, indeed, it does not appear that the accident was imputable to any defect of skill or due diligence on his part. The captors having taken the precaution of putting a pilot on board, are, I think, exonerated from an accident of this kind occurring in the navigation of the vessel; and I have no hesitation in pronouncing against the demand of damage.

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were not present, or personally concerned in the transaction. You will have to judge on the facts submitted to you, whether *there was* any misconduct or not. What my opinion is, I shall not think necessary to state to you at present, because it is the opinion of a person comparatively ignorant of such subjects. From your local knowledge of the island, and of the navigation of that port, you will be enabled to form a more correct judgment, whether the prize-master was guilty of any neglect of duty, fairly chargeable upon him, in omitting to take a pilot, and, more especially, whether he was justified in not acceding to the request made by the master of the vessel, *that he would take a pilot?* Should you be of opinion that he was justified in not taking a pilot, you will then consider whether, in proceeding in the course described, up to that particular point, he made proper allowance, as a pilot or person prudently conducting the navigation of the vessel, so as to avoid, on one side, the sunken rock, which he was bound to know, and, the other side, to guard against the danger of being carried out by the current, which he seems to have apprehended.

The *Trinity Masters* reported—That in not taking a pilot, all was not done that ought to have been done; and, secondly, as to the track pursued, that *there was a want of due skill in not steering clear* of the rocks, which are pointed out to the pilots of the island by particular marks.

Court.—You, Gentlemen, would have thought a pilot very deficient if he had not avoided them.

Answered—In the affirmative.

Court.—My own opinion perfectly coincides with what you have expressed. From the prize-master's own affidavit it appeared to me, that there could be no doubt.

Restitution in value decreed.

The
WILLIAM.

Dec. 17th
1806.

Dec. 19th,
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THE HORATIO, NELSON, Master.

Prize Act,
Construction
on the term,
setting forth
by the enemy, &c.

THIS was a question on the re-capture of a *British* slave ship, that had been taken on the coast of *Africa*, by three *French* privateers, who had put men on board, and had fitted her out, as it was suggested, as a privateer.

On the part of the re-captors, the *King's Advocate* submitted—Whether the employment of this vessel, as an armed cruizer by the enemy did not supersede the claim of the original owners, under the clause of the Prize Act, which directs, that, “ if such ship or vessel, so retaken, shall appear to have been after the taking of His Majesty’s enemies, by them *set forth* as a ship or vessel of war, the said ship or vessel shall not be restored to the former owners or proprietors, but shall, in all cases, whether retaken by any of His Majesty’s ships, or by any privateer, be adjudged lawful prize for the benefit of the captors.”

Court.—I am of opinion that this is not such a case, and that it is not to be considered as such a *setting forth*, under the Prize Act. Here is no commission of war—no arming of the vessel, she being, I conceive, originally armed as a slave ship. The mere act of putting an additional number of men on board, in this manner by an enemy privateer, will not, I think, have the effect of defeating the title of the original owner.

Restored on salvage.

THE CONSTANTIA, HENRICKSEN, Master.

Jan. 13th & 17th,
1807.

THIS was a question respecting the proprietary interest of 100 hogshheads of brandy, which had been shipped at *Cette*, for the account and risk of Mr. *Kye*, of *Copenhagen*, but which were afterwards, when on board, countermanded by an indorsement on the bill of lading, accompanied by corresponding instructions given to the master by the shipper, under an erroneous information received of the insolvency of the consignee.

Proprietary interest in goods, ordered and shipped, but afterwards re- strained, to a different consignment by the shipper—Right of the shipper, in such cases, limited to cases of insolvency, &c.

JUDGMENT.

Sir *William Scott*.—This question arises on the property of 100 hogshheads of brandy, taken on the 22d *March*, on a voyage from *Cette* to *Copenhagen*; and the question is, whether these goods are to be considered, under the circumstances attending them, as the property of the Consignor at *Cette*, or of the Consignee at *Copenhagen*. The proofs of property that are offered are, first, the letter from the consignee, in which he quotes some preceding accounts, and then gives orders for another parcel of brandy, at a low price, with the expression of a wish “that the shipment might not be made till *April*,” though it turns out that the shipment was actually made early in *February*; and the shipper is authorized to draw for the value on Mr. *Reinke*. This is the foundation of the transaction; the only material letter produced, being that of the shipper, on the 8th of *February*, referring to a former of the 10th of *January*, and advising the claimant “that the brandies were shipped, and that in the beginning of the next month they would be ready to sail, and that he had actually drawn for the amount.”

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In this letter the shipper writes, "we observe the extension of your limits in your letter of the 24th *December*, which has come to hand," but takes no notice whatever of the restriction, as to time, that the shipment should not be made till *April*. That is a difficulty which yet remains unexplained. In this correspondence there is a reference to two letters which do not appear, one to Mr. *Hans Kye* the claimant, and one from him of the 24th *December*, which might contain some explanation, but these are not produced.

The next paper on which any observation arises, is the bill of lading, not only consigning the goods to Mr. *Hans Kye*, but expressing also his "*account and risk*." This paper is accompanied, however, with this material circumstance, that it bears an indorsement to the effect following. After the shipment of the goods, and the drawing of the bills, the shipper and the master go before a magistrate, and it is recited on the bill of lading, "That whereas the master cannot deny that he has received 100 hogsheads of brandy for Mr. *Hans Kye*, but as the interest of the shipper demands that they should not be delivered to Mr. *H. Kye*, the master is prohibited from delivering them to him, but he is directed to deliver them to Mr. *Ryberg*," making the master responsible for the observance of these orders. On this indorsement two or three observations arise; the first is, that it is absolute and unconditional in its form. For the motives which led to this alteration, we are to look elsewhere, to a letter of the Consignor. There is nothing appearing on the face of the revocation itself, that in any manner intimates the ground on which it was made. Another observation is, that, although the consignment is altered, there is nothing that expresses any variance of the *account and risk*, as deducting in any manner from the description before given of it.

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The next paper is a letter and affidavit of Mr. *Reinke*, on whom the bills were drawn, in which he states, "that he had been in habits of business with Mr. *Kye* to a great extent, but that he had received no notice from Mr. *Kye*, advising him that the bills were to be drawn, or making any provision for the payment." He then states, "that he wrote to Mr. *Kye* on the 28th *February*," though that letter is not exhibited; but there is the answer of Mr. *Kye* of the 4th of *March*, in which he says, "I received your letter, but I did not expect the shipment to be made so soon;" from which we may infer, that the deviation from the orders in this respect had not been explained to him. The last material paper is a letter from the shipper to Mr. *Ryberg*, of *Copenhagen*, in which reference is made to a former letter not produced, but which must, I conceive, have conveyed authority to him to take charge of these brandies. It is to this effect—"Referring to our letter of the 17th of *February*, in which we desired you to take possession of the brandy shipped for Mr. *H. Kye*, we hereby revoke it, because we are informed that Mr. *Kye* has ordered our drafts to be accepted, and that the intelligence on which we acted is erroneous; that it is not Mr. *Hans Kye*, but a Mr. *Kubl* who has stopped payment. You will, therefore, not act; but as Mr. *Kye* may be displeased, if he knows what we have done, we request that you will not suffer the indorsement to appear. If Mr. *Kye* hears of it, and says any thing about it, we have sent you another letter, which we desire you to present." That letter is not exhibited.

The first point for consideration is, whether the transaction did pass in the manner in which it is stated; and for this purpose it may be necessary that the letter of Mr. *Kye*, of the 24th of *December*, and the two

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or three other letters, to which a reference is made, should be produced; that of the 10th of *January*, from the consignor; also that of *Reinke* to *Kye*, advising him of the bills; that to *Ryberg*, of the 17th of *February*; and more especially this open letter, which was to give an account to Mr. *Kye* of the motives which had influenced the conduct of the shipper. These will be necessary to be produced in order to establish the fact, on which the question of law must depend.

Taking it, however, for the present, as sufficiently raised, I will now consider it, for convenience, that if the opinion of the Court is known, it may prevent the case from coming before me again. Upon the former hearing, I was, of course, struck with the class of cases familiar to us all, relating to the power of the consignor to stop *in transitu*. What the law of this country is on that subject, and also what the tendency of the civil law was, is very perspicuously stated by Mr. *Abbott*, in his treatise on the law of shipping. With respect to the introduction of the principle into the law of this country, he says, (a): "But as in the case of a consignment on credit, it often happens that the consignor learns, after the shipment, that the consignee has become a bankrupt or failed, and consequently, by a delivery to him or his assignees, the whole or the greater part of the value of the goods will be lost, the law, in order to prevent this mischief in such cases, allows the consignor of goods sent by a general ship, or by a ship chartered by him, to stop the goods *in transitu* on their passage to the consignee; and before, or at their arrival at the place of destination, to cause them to be delivered to himself, or to some other person for him. This rule of the law of *England* was first established in the

(a) Law on
Shipping, &c.
p. 298.

See also the later
Edition, 1808,
p. 352.

the Court of Chancery (*a*), and has been since frequently carried into effect (*b*).

This is the doctrine of the law of *England*, and I may add also the general expression of the mercantile law on the subject; because I take it to be the rule, that when a vessel is chartered by the consignor, and goods are put on board, those goods are considered as *in transitu*, and when the consignor has not received payment, he has a right to stop and divert the delivery of those goods, and has what Lord *Mansfield* calls 'a proprietary lien upon them; a privilege recognized by the general law, as well as by our own; more especially by the *French* law, which is of the most importance in this case of a *French* transaction, (*c*), which allows the *vendeur primitif*, as he is termed,

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(*a*) 2 Vern. 203.
1 Atkins, 245.
Ambler, 399.

(*b*) *Bohtlinck v. Inglis*, 3 East's Reports, p. 395.

(*c*) Upon a question respecting the power of the holder of bill, of lading, to sell effects at sea, or in the Colonies, Mr. *Emerigon* recites the opinion of Mr. *Valin*, who, drawing an illustration of his argument from the principle of *Cession*, under the *French* law, had observed, "Il suffit qu'il soit porteur des facteurs, ou des connoissances des marchandises dont le transport lui est fait, soit par un ordre à son profit au dos de ces pieces, soit par un acte séparé perdevant notaires, ou sous signature privée; d'autant plutôt que tout est à ses risques dès l'instant du transport."—The observations with which M. *Emerigon* replies to this argument, being of a *general* nature, are applicable also in some respects, only to the present question, and with that view only are here extracted: "Mais ces sortes de cessions déferent au cessionnaire un simple droit *ad rem*, qui lui donne pouvoir de requérir la délivrance des effets indiqués, sans le mettre en possession effective de la chose même. Ainsi, jusqu'à ce que la tradition réelle ait été faite dans un temps utile au porteur du connoissement, il n'a qu'un action personnelle, qui est subordonnée aux droits du tiers. Je crois donc qu'une pareille cession ne sauroit nuire, ni au *privilege du vendeur primitif*, non payé du prix, ni au *privilege du donneur a la grosse*, ni au aux droits de la masse des créanciers. Telles sont

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termed, to protect himself against non-payment by the seizure of the goods.

The revocation in this transaction was not explained, but was expressed in absolute terms; and I am clearly of opinion, that if Mr. Kye had been an insolvent person, it would have amounted to a complete and effective revendication of the goods. But if the person to whom they are consigned is *not* insolvent; if, from misinformation or from excess of caution, the vendor has exercised this privilege prematurely, he has assumed a right that did not belong to him, and the consignee will be entitled to the delivery of the goods, with an indemnification for the expences that may have been incurred. In the law of *England*, as far as I can collect it, and in all books into which I have looked, it is not an *unlimited* power that is vested in the consignor, to vary the consignment at his pleasure in all cases whatever. It is a privilege allowed to the seller, for the particular purpose of protecting him against the insolvency of the consignee. Certainly it is not necessary that the person should be actually insolvent at the time. If the insolvency happens before the arrival, it would be sufficient, I conceive, to justify what has been done, and to entitle the shipper to the benefit of his own provisional caution. But if the person is *not* insolvent, the ground is not laid on which alone such a privilege is founded. Then, if Mr. Kye has proved insolvent, the shipper will have exercised his privilege. But if he is not insolvent, and has actually provided for the payment

Emerig. vol. 1.
p. 318, 319.

font nos regles. *Le connoissement n'a jamais été considéré parmi nous comme un papier négociable. Le transport du titre d'est une tradition feinte, qui s'évanouit par la faillite ou l'insolvabilité notoire du cedant.* On the question, how far a bill of lading is considered as negotiable under the law of *England*.—See Mr. Abbott's Treatise on Shipping, enlarged edition, 1808, p. 37.

of the goods, he will be entitled to the delivery; unless it can be shewn that the right of the shipper extends farther than I have stated it, and that it amounts to an unlimited right to vary the consignment at pleasure.

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Where goods are shipped without orders; such a right exists.—The seller, if he may be so described, retains an absolute power over them, for there is no purchase. But when orders have been received and executed, and delivery has been made to the master of the ship, and bills of lading signed, the seller is *functus officio*, except in the peculiar case in which he is again reinstated by the privileges of the *vendeur primitif*. That will make it a matter of fundamental importance, that the letters containing the original order should be produced. The mercantile law I take to be clear and distinct, that the seller has not a right to vary the consignment, except (a) in the case above stated. The mischief and inconvenience that would ensue on a contrary supposition are extreme. The goods might be put on board, and might lie at the risk of the consignee for two or three months; and if the consignor could come, and resume them at pleasure, it would place the consignee in a situation of great disadvantage, that he should be exposed to the risk during such a length of time, for an object which might be eventually defeated, at any moment, by the capricious or interested change of inten-

(a) This seems to be the *sole* foundation of the power, as recognized also, in the courts of common law *of this country*.—"If goods be sent by order of the consignee, on his account, at his risk, and the consignor draw bills of exchange upon him for the price, and indorse and transmit the bill of lading, the consignor cannot take possession of the goods at the place of destination, and insist upon immediate payment as the condition of delivering them, the consignee being willing to accept the bills, and not having failed in his circumstances." *Abbot*, *supra* p. 358.

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(a) Vol. I. 317,
318.

(b) St. Jean,
vol. I. p. 317.

(c) La Proven-
cale, lb. p. 318.

tion in the breast of the consignor. It would be to expose the consignee altogether to the mercy of the seller.

On the enquiry which I have been able to make, I collect that this is the reasonable distinction; and I find two or three cases in the *French* law, reported by Mr. Emerigon (a), which very much illustrate this doctrine. The first case to which I allude is one of six bales of silk, which had been consigned to the bearer of the bills of lading, of the 20th of *October* 1753, which had been forwarded to a house at *Alicant*, and by them to *Jeaume* and Co. at *Mar-seilles*, with orders to receive the bales on their arrival. On the 31st of *October*, a different bill of lading was transmitted to another house, at *Madrid*, who forwarded it to Mr. *Rey*; and on these facts a disputed claim arose, which was determined by a judicial sentence, 1st of *August* 1754, directing the goods to be delivered in moieties to the different consignees. But on appeal to the superior Court, that judgment was set aside, and it was determined, 1755, that the holder of the first bills of lading was entitled to the possession of the whole (b).

There is also another case (c) to a similar effect, of a parcel of sugar which had been shipped at *Cape Francoise*, to the consignment of Mr. *Rey*, to whom one set of bills of lading had been sent. Some time after, the shipper sold the same sugar, to another person, but without unshipping them, because the captain, conceiving himself to be bound by his bills of lading, refused to deliver them. The sale was indorsed on the bill of lading remaining in the power of the shipper, and was by him forwarded to Mr. *Fenouillot*. On application to the Court, possession was decreed, 29th of *April* 1750, to Mr. *Rey*, as the person virtually in possession by the effect

effect of the original consignment. There is also a third case, cited by Mr. *Emerigon*, in which a similar sentence was given in favour of Messrs. *Guieu* and *Linchou*, relative to thirty-six bales of wool shipped to their consignment, *pour compte de qui il appartiendra*, but afterwards sold to one *Bourdon*, under a private declaration, endorsed on one of the bills of lading. These cases I consider to be a clear exposition of the law (a), that persons having accepted orders, and made the

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(a) In the *Twende Venner* (a), *Munck*, a question of a similar nature came before the Court, respecting the power of the shipper to revoke the consignment *in transitu*. A parcel of goods had been shipped at *Cette*, by the house of *Nellon* and Co. by order, and for the account and risk of *Anderson* and *Smidt* of *Copenhagen*. The ship sailed on the 6th of July, 1806; but *Anderson* and *Smidt* had, in the mean time, signified, that they would not accept the goods, and on this refusal, the shipper wrote to Mr. *Willinck*, 14th July, offering the goods to him on conditions of payment, which were accepted. The acceptance was declared by letter, 29th July. Bills were drawn and paid, and the policies of insurance were transferred. The goods were captured on the 24th August, and a claim was given for Mr. *Willinck*, in support of which, the facts above stated were without reserve submitted to the Court. On the result of the evidence, the Court observed, This is a point which is submitted to the Court in a very fair and ingenuous manner, and so as to repel every imputation of fraud. But the question is, whether the claim as it stands is admissible. The first point to be determined is, whose property the goods were at the time of sailing. If the bills of lading were signed to the account and risk of *Anderson* and *Smidt*, and the goods sailed under that description, they were the goods of *Anderson* and *Smidt*, and the shipper had no right to stop them, but on the special contingency of an apprehension of non-payment. On that event the law gives him a proprietary lien for his security, and the right of stopping the goods. In this case it is asserted, that *Anderson* and *Smidt* actually refused to pay for the goods, and therefore the event had emerged on which the right of the consignor to stop is founded. Undoubtedly the shippers might have forced the goods on the consignees under the

(a) 23d July,
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the consignment, have not a right to vary that consignment, except in the sole case of insolvency. The alteration may be made provisionally, without actual insolvency; but if the insolvency does not take place, the act which has been done is a mere nullity, and the seller has exercised a power, to which the law does not ascribe any legal effect. In the case before me, it appears, that the apprehension entertained of Mr. Kye's insolvency was erroneous; I am of opinion, therefore, that the goods were shipped for the account and risk of the consignee, and still continued his property, and that he will be entitled to restitution on making proof of the necessary facts, which I have above stated to be left in some obscurity, owing to the non-production of several parts of the correspondence. These goods came before the Court on a subsequent day, when the proofs of the fact were held to be sufficient, and the goods in question were pronounced to be the property of Mr. Kye (*a.*)

(*a.*) May 5, 1808.

orders, and might have compelled them to accept and pay. But they do not exercise that right, they take the goods to themselves again, in order to sell them to another person, and by that act the goods had become again the property of the shippers. Then comes the question which answers itself; whether the goods of an enemy can be transferred *in transitu*. After the numberless cases in which this question has been determined, it is not now an arguable point. In time of peace, when the rights of third parties do not intervene, there may be no objection to the validity of a transfer of this kind. But in time of war, it would open a door to fraud, against which Courts of Justice could never be effectually protected, and therefore it has been prohibited. This being a transfer of property from the enemy *in transitu*, the goods must be condemned as still belonging to the enemy.

THE SAN JOSEPH, ARGOIS, Master.

13th Feb. 1807.

THIS was a case on the capture of a *Spanish* frigate, on board of which were a number of *British* prisoners of war. On the question of head money, the *King's Advocate* submitted—Whether the Court could include *British prisoners on board*, in pronouncing on the number of persons for whom head money would be due.

Head-money, for *British* prisoners of war, on board an enemy's frigate, not pronounced to be due.

The Court was of opinion that they could not be included.

THE ELEONORA WHELEMINA,
ZIMMERMAN, Master.

Feb. 27th,
1807.

THIS was a case of a ship under the *Russian* flag, captured Oct. 2, 1806, on a voyage from *Riga* to *Amsterdam*, with a cargo of wainscot pieces, boat masts, common spars, and ruckers. On a former day, when the case was first opened, an inspection was directed to be made of the nature and quality of the articles; and on this day the report of one of the commissioners of His Majesty's yards was produced, which described the mast pieces to be "one *Riga* round mast, 72 feet long, and about six feet from the heel, 21 inches diameter, fit for top-masts and yards for men of war. Three other *Riga* round masts, commonly called hand-mast pieces, about 70 feet long, and at about one-third from the heel, one 19 and a half inches or 20 inches, and the third 19 inches in diameter, fit as above; three double *Riga* boat masts or spars, 52 feet long, and from 8 inches and a half to 12 inches in

Russian treaty—
Ship and persons
of the country—
Order, Sep. 1806.
Innocent articles
to France and her
allies, not held to
protect naval
stores to *Am-*
sterdam.

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diameter, fit for top-gallant-masts, yards, and booms; 1024 ruckers, from 20 to 26 feet in length, fit for boat masts."

On the part of the captor, the King's Advocate and Laurence contended—That this was a cargo in its nature *contraband*, that it was not entitled to any privilege under the *Russian* treaty for several reasons:—1st. Because the character of the vessel and of the master could not be considered as conformable to the description contained in the treaty. The vessel could not be considered as a *Russian* ship; she had been recently purchased of a *Prussian*, and was *Prussian* built; the master was not a person "*of the country of Russia*," being a *Prussian* by birth, who had recently taken a burgher's brief at *Riga*, for the purpose of navigating in the *Russian* trade, but having his domicile at *Pillau*, in *Prussia*, where his wife and family were still continuing to reside. In these respects, therefore, the condition of the ship, and of the master, *not being of the country of Russia*, did not answer the description of the treaty which had provided special privileges for the navigation of *Russia*, properly belonging to that country, but without intention of communicating the benefit to any individuals of other countries, that might assume the *Russian* character, for temporary purposes, or with a view of avoiding the disabilities attaching on their own national character from a state of war. That there were not the *regular documents* required by the treaty, inasmuch as there was *no pass*. But a more special objection arose on the ground, that the treaty was formed for the regulation of the trade of *one of the parties* being *neutral*, whereas the situation of *Russia* was that of a belligerent, associated in war against

against a common enemy, to whose ports these supplies were going; that no protection therefore could be derived from the treaty; but that the articles would be subject to condemnation in their *ordinary* character, as naval stores going to a port of the enemy, and *that* a port of military equipment.

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On the part of the claimant, Arnold and Robinson—

Adverted to the *permission* (a) which had been recently signified to have been given by the Government to subjects of *Russia* to carry on a trade with *France* and her allies, in innocent articles; and contended, that the offence of trading with the enemy was removed by this order; that the question reverted therefore to the consideration of the character of the goods, which were *Russian produce* exported in a *Russian ship*, and as such entitled to be considered as *innocent articles* under the treaty. That as to the objections raised with respect to the forms required by the treaty, the pass was an instrument not specially required by that article of the treaty, on which this question depends. It was an instrument that was not invariably granted, as had appeared in many other cases. The papers were authenticated by the magistrates of *Riga*, which must be taken as a sort of official approbation of the voyage, so far at least as to prevent it from being considered as a secret or clandestine transaction, concealed from the view of the government of *Russia*. That it did not appear that the vessel was required to be of the built of that country; much less that the master must be a natural-born subject. The terms were, "*ship and master of the country*," which implied no more than the ordinary condition on which foreign vessels, and foreign mariners, were admitted

(a) Nov. 14-
1806.

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(a) Wilson v.
Mariyal, 1 term
Rep. vol. 8, p. 43,
and Scott v.
Schawitz, Com.
Rep. p. 67,
there cited.
See also 1 Buf.
& Pul. 430.

to incorporate themselves with the people of a country, and could be meant only to provide for the *bona fide adoption*, in opposition to cases of manifest fraud and colour. That there had been a question at common law on the effect of the acquired character, in which similar objections had not been allowed to prevail (a). In answer to the description of particular articles, as reported on inspection, an affidavit was offered, of experienced shipwrights, shewing that the articles were such as were commonly used in the equipment of merchant vessels (b).

JUDGMENT.

Sir *W. Scott*.—On the report of a person authorized to enquire into the nature of these articles, they have been pronounced to be of a contraband or noxious quality, and the general rule undoubtedly is, that where there are such articles on board, the taint extends to other parts of the cargo, and also to the vessel, being the property of the same owner. The whole property is considered as taken in a transaction in both respects illegal, in supplying the enemy with such articles, and also in providing the vehicle for their conveyance. The only question then will be, whether there are any circumstances that will take this

(b) The Court rejected the affidavit, observing, that since it was sufficiently ascertained, that they were fit for ships of war, it would be immaterial to shew that they might also be applied to the equipment of merchant vessels. That as the port of *Amsterdam* was a place of military equipment, much in want of such supplies for the military marine of the enemy, *that* would be sufficient to decide on the pretensions to have these articles considered as innocent articles.

case

case out of the general rule, and exonerate the ship and cargo from the penalty ordinarily attaching on other vessels and goods so employed. A reference is made to the order of the *Russian* government, as recited in a recent order of our government, recognizing the permission there granted: "*to trade with France and her allies in innocent articles;*" but it never can be the construction to be put on that order, that it should extend the protection to a mixt, *assorted* cargo, consisting of articles partly innocent, and partly noxious.

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As far as the question turns upon the treaty, I am of opinion that the treaty must be held to apply only to cases, where one party is in a state of neutrality, and not where both are connected in hostilities against one common enemy. The context of the whole treaty clearly refers to such a trade only, and cannot be extended to the trade of either country, at a time when both countries are associated in war, and are bound to contribute their whole force and energy against the common enemy. I am of opinion, therefore, that the treaty does not apply to the situation of the parties at the time of this transaction. I am of opinion also, that it does not apply to the facts of this case, because till I am better instructed, I shall hold that the national character of a man who has only just quitted the *Prussian* navigation, and has his wife and family still resident at *Pillau*, cannot fairly be considered "*as of the people of Russia.*"

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THE CAROLINA, VERHAGE, Master.

Cartel, as appointed in time of peace, and by an officer in the *East India Company's* service, if in substance valid against capture, on the event of a supervening war.

THIS was a case respecting the validity of a protection granted to a *Dutch* vessel on cartel service, during the peace, by Colonel *Oliver*, the commander of the *British* forces at *Amboyna* (a), for the purpose of evacuating that island, in execution of the treaty of *Amiens*.

On the part of the captor, the King's Advocate and Arnold contended,—That it was a contract formed prior to the existing war, and by an officer in the service of the *East India Company*, who had no power or authority to grant the privilege of cartel. That though they might have made themselves responsible to indemnify the *Dutch* ship owners, the captors were entitled to the condemnation of this property, as the property of the enemy, taken in time of war, and not protected by any authority that could avail to take off the effect of the Declarations of the Order of Repprisals, and of the Prize Act. That if the cartel could be considered as originally valid, the master had forfeited the benefit of his protection by taking goods on board, contrary to the conditions of his contract.

On the part of the claimant, Laurence and Burnaby.

JUDGMENT.

Sir *W. Scott*—The privileges and immunities of cartel ships are of a very sacred nature, and are to be

(a) The claim was given jointly on behalf of the *East India Company* and the *Dutch* owners.

received

received with great respect, inasmuch as they tend very beneficially to mitigate the miseries of war, and to facilitate the return of peace, by the removal of those obstructions, which put a stop to the intercourse of nations. With respect to the general character of contracts of this description, I am disposed to hold, that the actual existence of a war is not essentially necessary to give effect to them, but that it will be sufficient, if they are entered into prospectively, and in expectation of approaching war. Because the occasions for them may just as naturally arise from a view of approaching events; parties may contract to guard against the consequences of hostilities which they may foresee; and in this instance it is manifest that such apprehensions, which were very general, have been fully justified, by the course of events that have ensued.

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The next question that has been raised is, whether the protection has been granted by competent authority, and whether the *East India Company* and their officers can be held to have that power. That his Majesty has a power to confer the protection of cartel is undoubted, and has not been brought into question. Notwithstanding he may have given away the interest of all captures to the captors, his Majesty may still grant such particular exemptions, as in his wisdom he may deem expedient. And when a cartel appears to have been employed in the public service, and for purposes of national utility, that circumstance alone will entitle it to be considered as an engagement sanctioned by the public Councils of the State.

Authority delegated by the Crown may be taken as emanating from the Crown; and it is to be observed, that the governor of *Madrai*, who became afterwards
a party

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"a party to this contract, is an officer of the Crown, as well as of the *East India Company*. It is the practice, I conceive, for general orders and instructions to be sent out to all persons exercising the functions of the Executive Government abroad; but as it would be impossible to provide for all the special exigencies that may occur, such persons must often be left under the necessity of acting on their own judgment and discretion; and what is done by them under such circumstances, in the execution of their public duty, may fairly be considered as done under the authority of the Crown, if not renounced by the crown in subsequent actions or declarations.

There is much additional weight also in what has been observed upon the occasion, out of which this transaction arose. That it was an act done in execution of a treaty of peace. By the treaty of *Amiens*, it had been stipulated that the *British* troops should be withdrawn from *Ambony*; and this expedient was resorted to by Colonel *Oliver*, as the best means of carrying that stipulation into effect. It is said, that some other mode might have been adopted. That is a fact on which the Court can receive no assurance. It is recited in the charter-party, that *British* ships had been expected, but that they had not arrived. However that might be, this measure was adopted for the purpose of carrying away the King's and the Company's Troops. Therefore, if nothing else appeared in the case to give public authority to this transaction, I should be disposed to hold it to be sufficient, that it was done in execution of a treaty of peace, and conformable to orders, which must always be supposed to be duly trans-

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transmitted to the officers of Government in distant parts of the world, for the purpose of carrying the stipulations of the treaty into effect. The same privilege was confirmed by Lord *A. Bentinck*, the Governor at *Madras* (a). For it appears, that the vessel performed her voyage according to the stipulation, and arrived at *Madras*, having taken no goods on board in that voyage. *If she had*, the objection might have been raised, that there had been a violation of the agreement. But the vessel arrived at *Madras*, without any imputation on the manner in which she had conducted herself; and the agreement was recognized by the Governor, whom I have a right to consider in this transaction, as the Governor of the Crown, as well as of the *East India Company*, notwithstanding the style and form of his commission. He confirms the whole contract, and engages that the vessel shall sail with a protection, notwithstanding the hostilities that had then actually broken out. In this view of the subject, I do not associate, what, I think, is to be considered as of no inconsiderable importance in itself, the great extent of power and privileges which the Company enjoys in that part of the world, relative to the prerogative of war and peace. It is not necessary to bring these

(a) The passport granted by the governor in council, bearing date the 2d September, 1803, recited, that this vessel had been sent from *Amboyna* to *Fort St. George*, with the garrison of *Amboyna*, under a charter-party entered into with Colonel *Oliver*, the *British* governor of the *Moluccas*; and under a condition that she should be considered as entitled to the privileges of a cartel ship, till her arrival at *Grisee*, in the island of *Java*.

The passport was granted to the above effect, with the provision, that she should do nothing to forfeit the privilege.

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topics into discussion, because I am of opinion, that the authority under which this act was done is sufficiently supported, as emanating from persons who are to be taken as officers of government, employed in the execution of so great a public measure, as that of a treaty of peace.

Then as to the conduct of the vessel, subsequent to her arrival at *Madras*, is there any thing on that part of the case that can be held to affect the privilege, which I have said had been legally confirmed. The vessel took in a cargo at *Madras*, as it was stipulated she should be at liberty to do, to the amount of her freight, free from duties. That was a part of the original agreement. It appears, that in touching at *Malacca*, on her return to *Java*, some few other articles (*a*), to the amount of 19 boxes, were taken on board, in respect to which the master cannot depose to the property. They can derive no protection from the original contract, and must be condemned. But I am of opinion, that the vessel and the cargo taken in at *Madras*, and the master's own property on board, are entitled to be restored.

(*a*) Nineteen packages, containing writing desks, a sealed chest, earthen pots, barrels, a small box, two cinnamon sticks, and three small parcels, consigned to different persons at *Batavia*. The master had sailed from *Malacca*, but being in danger of falling in with pirates, put back again, and was seized on the 30th Nov. 1803, whilst at anchor in the roads of *Malacca*, by his Majesty's ship *Rattlesnake*.

THE RECOVERY, WEBB, Master.

May 13th,
1807.

THIS was the case of an *American* vessel with a cargo of cotton, taken in at *Bombay*, from whence she had proceeded to *Salem*, in *America*, where she arrived in *January* 1807, and sailed again, without unloading the cargo, on the 13th *March* 1807, for *Rotterdam*, and was taken on that voyage, on the 22d *April*.

Navigation Act.
If applicable to the trade of the *British Settlements in India?*
—Plea of offence under that branch of the Admiralty jurisdiction, not available in bar of a claim of the neutral proprietor in the Prize Court.

On the part of the captors, the King's Advocate and Robinson contended—First, that it was a trade in direct violation of the *American* treaty, which had permitted *American* vessels to trade to the *British* possessions in *India* only, on condition that the goods taken in there should be carried to some of the ports of the *United States*, where they should be unloaded.—Art. 13.

It was answered—That the 13th Article of the Treaty was stipulated to expire two years after the termination of the war then existing, viz. in *October* 1804; and on enquiry, it being ascertained that this was the authentic exposition put upon the treaty in practice, that point was abandoned.

It was then contended, that since the stipulation of the treaty had expired, this became a trade altogether illegal, as in breach of the Navigation Laws; that it was clearly within the terms of the Act 12th of *Charles II.* c. 18, and had been so treated in recent instances, in which the question had been drawn into discussion in the King's Bench (a); that the Act

(a) *Wilson v. Mariot*, 8 Term R. p. 31.

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(a) 37G.3.4.97.

of Parliament, which had been made for the purpose of giving effect to the *American Treaty* (a), spoke of it in the same manner; and that a still later Act, 37th *George III. c. 117*, which had been passed to authorize some indulgence to foreign ships, considered the principle of exclusion as still in force, under the Navigation Act, and had introduced exemptions not absolutely and generally, but *partially* only, and *apparently* on terms of trading *to the foreign country* to which the ship belonged, and on conditions which were not shewn to have been complied with, namely, "That the trading of foreigners to these countries should be subject to such regulations as the *East India Company* should impose."

On the part of the claimants, Laurence and Burnaby contended, That if the seizure was to be considered as made on account of a breach of the Revenue Laws, this was not the Court in which such an offence should be prosecuted; that as to *English* subjects, the principle of excluding them from supporting a claim in the Prize Court, in a transaction which has been carried on, in a breach of the municipal law of the *kingdom*, was of *recent introduction*, and liable to considerable objection. It confounded the proportions which the law had established, between the penalty and the offence in question, in other acts which more particularly related to this subject. By the Acts passed for the protection of the *East India Company's* Charter, a specific penalty of 500*l.* was inflicted on persons trading in violation of the Company's privilege. But by the introduction of this principle of exclusion, the penalty became unequal, according to its operation
in

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in times of war or peace. That in respect to foreigners, who are not held to the same observance of our municipal laws, it failed altogether in the reasoning, on which the rule of law had been constructed. With respect to them there was no instance in which it had been applied; on the contrary, wherever the argument had been introduced, the Court of Admiralty had invariably intimated an opinion, that it could not with propriety be applied to foreign ships. That whatever the expressions of the Navigation Act might seem to imply, in the very general terms in which it was drawn, the principle had never been applied to the settlements in the *East Indies*. They were posterior in their establishment to that law. They differed altogether in the nature of the system that was observed as to them; and had never been held subject to the same exclusive principles of monopoly, which had been applied to the *European* colonies in the *West Indies*. The discussion that passed on this subject, in the case of *Wilson v. Marriot*, did not arise out of the facts that appear to have been material to the decision of the case. It arose merely on an assumption in argument at the bar, recognized in a very general manner by a *dictum* that afterwards fell from the bench. The opinion expressed on that occasion had been the cause of passing a special act, 39 G. 3. c. 117, solely for the purpose of counteracting the alarm and confusion which was apprehended from it. The introductory part of that Act recognized the right of foreigners to go to the *British* ports in *India*; and if any condition was imposed on the right so granted, it was merely that it should be exercised in compliance with the regulations which the *East India*

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Company should form. It did not appear that any regulations had been framed. The omission on the part of the *East India Company*, must be taken on their part as a tacit acquiescence in the practice, which had existed before. In any light, it must be considered as a neglect, which left the right entire, and could not defeat the privilege, which the Company had no power to annul, but only to modify and direct, by such regulations as might be necessary to reduce the privilege to an equitable conformity to the terms, on which the general trade of those countries was carried on.

The *Court* asked by what authority it could be shewn to be competent to the Prize Court of Admiralty to proceed to confiscation of a foreign ship and cargo for a breach of the revenue:

It was answered—That the 1st Section of 12 C. 2. c. 18. directed ships and cargoes so offending, taken at sea, to be brought in *as prize*, and empowered the Court of Admiralty to proceed upon them, which implied it to be an offence properly amenable to the jurisdiction of this Court.

JUDGMENT.

Sir *W. Scott*.—This is an *American* ship captured on a voyage from *Bombay* to *Rotterdam*, laden with a cargo taken in at a *British* settlement in the *East Indies*. The vessel touched at a port in *America*, but the cargo was not unladen there; and it appears, I think, from the result of the evidence, to have been originally designed for an *European* market. A claim has been given for the *American* proprietor, and no objection is made to the property. But the title to
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restitution

restitution is impeached on the illegality of the voyage, which raises a question of very great importance.

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The illegality imputed arises out of the system of our Navigation Laws, which seem to have continued in a very undefined state, with respect to our possessions in the *East Indies*. That system is to be referred generally to the celebrated Act of *Charles II. c. 12*; and though some traces are to be found in the earlier stages of our history, yet that act is usually considered as the basis of the system, as it now stands. The first section of that act begins with a general prohibition to foreign ships to trade to the *British* settlements in *Asia*, &c. I do not immediately recollect what were the possessions which this country held in that quarter of the globe at that time, but I should conceive that *Bombay* must have been the only *English* settlement, if indeed *that* was not acquired to the Crown, at a later period, as the dower of *Queen Catherine (a)*.

(a) That *Bombay* was the first *British* settlement in *India* may be collected from the following mention of it in the History of the *East India Company's* possessions in *India*:

"No sooner had his Majesty set on foot a treaty with *Portugal* for his marriage with the Infanta, than it was determined to embrace this opportunity of procuring the cession of some convenient port and mart for the *India Company*, as part of the Infanta's portion. Thus the important Island of *Bombay* came into the hands of the *English*." *Hist. of East India Company*, p. 73.

That it was not transferred till after the regulations of the Navigation Act appears from the dates. The Navigation Act, 12 Ch. 2. c. 18. was an act of the first parliament of *Charles II.* beginning April 25, 1660, and dissolved Dec. 29, 1660. The marriage treaty of King *Charles II.* with the Infanta of *Portugal*, with the sixth article for yielding *Bombay* to Great Britain, was signed June 23, 1661.—*Chamber's Treaties*, p. 256.

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That fact is not very material, however, since the act is not limited by such considerations, but applies prospectively to future acquisitions as well as to our more ancient possessions. I advert only to the state of our possessions at that time, as illustrative of the gradual increase, by which they have grown up to their present extent, and at no very distant period, from beginnings comparatively small.

It is well known that our establishments in that quarter of the world have stood on a very peculiar footing, which it has been perhaps the policy of this country not to define with great exactness. They may have assumed a different character at different times: and it may be very important in effect, and very proper in point of principle, that the general maxims of our navigation system should be applied to them in their present state, although there might have been a great anomaly in practically applying them at a former period. It will not, however, be necessary for me to enter into a discussion of the policy of such a measure.

With regard to the fact, I had always entertained the notion that they had not hitherto been so applied. But a case (a) occurred *not many* years since, which brought the consideration of the question in a distinct form before the Courts of Common Law. After repeated arguments and much deliberation, the Court of King's Bench expressed an opinion that the navigation laws did extend to those countries, and on a writ of error the judgment of the King's Bench in that case was affirmed, with a complete adoption of the doctrine laid down (b). An Act of Parliament was afterwards passed (c), to quiet the alarm which had been occasioned by this exposition of the law, and to recognize in general terms the policy of admitting foreign vessels to a regulated trade,

(a) *Wilson v. Maryat*,
Nov. 21, 1798.
8 T. R. 31.

(b) *Wilson v. Maryat*, Bof. &
P. L. Rep. vol. 1.
p. 432.

(c) 37 G. 3.
c. 97. § 22.
& c. 117.

on certain conditions, which the *East India Company* were empowered to impose. But nothing appears to have been ever done under those powers of the act: and now, for the first time, the question arises, What is the state of the law, as applicable to this peculiar situation of things, the provisional relaxation of the Act of Parliament, and the total inaction on the part of the *East India Company*, who have, for more than eleven years, delayed to apply the regulations, under which the Act of Parliament had expressed it to be expedient, that foreign ships should be admitted.

This is a question of very considerable magnitude and importance. But there is, I think, a preliminary question, which may supersede the necessity of pronouncing a decision upon it; and that is, whether the more general question is properly brought before the Court in its present form? If it is not, I shall not be desirous of delivering my sentiments upon it, unless I am called upon in another form of proceeding, which would bring it before me as a case of undisputed jurisdiction. The Court of Admiralty is a Court of Revenue in one of its branches—in its appellate jurisdiction at least, and appears to be so intended to act *originally* in the cases specified in the statute referred to. But I am now sitting in a Court of Prize, and the prayer that is addressed to that Court is, that it would inflict the penalties of the Revenue Court on a foreign ship and cargo, that is brought before it on a seizure of war. I should have been glad to have heard under what authority the Court of Admiralty could mingle its jurisdiction in this manner. As to the authority of precedents, I will take on myself to say, that there are none. The cases (a) that have been mentioned were not of that description; they were not cases in which the Courts that decided them took on themselves to exercise the jurisdiction of the Re-

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(a) *Enterprise*,
Estruso *supra*
vol. 2, p. 84.

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venue Court, or to inflict the penalties growing out of that species of law. What they did was only to reject the claim of *British* subjects in a Prize Court, in a transaction which evidently shewed those individuals to have been acting in violation of the laws of their country, which they were bound to observe. That is a well-known doctrine recently introduced, and which has not been applied without leaving considerable difficulties behind it. There is, on one side, the difficulty of transplanting the consequences of one species of law to another system. On the other, there is the difficulty of admitting a *British* subject to set up a demand in a Court of Justice, for an *interest* which he cannot sustain, without shewing himself to have acquired it in violation of the laws of his country.

But there is no instance in which the same principle has been applied to foreigners. In some cases where it has been pressed in argument, the Court has invariably resisted the application; and there are many reasons which would make me very unwilling to take on myself the extension of the principle, without having it imposed upon me by the authority of the superior Court. It is a question of very great importance, and if all other considerations were out of the way, a sense of propriety alone would deter me from extending the principle in a case, in which it came only *incidentally* and *indirectly* before me. It is asked, if you apply such a principle to the claims of *British* subjects, why not also to those of other nations? Some distinctions are obvious. In the first place it is to be recollected, that this is a Court of the Law of Nations, though sitting here under the authority of the King of *Great Britain*. It belongs to other
nations

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nations as well as to our own; and what foreigners have a right to demand from it, is the administration of *the law of nations*, simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which, it is well known, they have at all times expressed no inconsiderable repugnance. In the case of a *British* subject it is different. To him it is a *British* tribunal, as well as a Court of the Law of Nations; and if he has been trampling on the known laws of his country, it is no injustice to say, that a person coming into any of the Courts of his own country, to which he is naturally amenable, on such a transaction, can receive no protection from them. This difference of situation does, I think, afford a sound and material distinction. As to foreign nations and their subjects, the breach of our prohibitions of trade are merely *mala prohibita*; it is an offence against the peculiar law of this country, which they may justly demand to have tried more directly under that system of law to which it properly belongs. With respect to a *British* subject, the violation of the laws of his own country carries with it also the *malum in se*; and therefore it is no injustice to him that his claim should be subject to rules, which this Court may not think itself at liberty to apply to the subjects of foreign states.

On these grounds, therefore, I shall pronounce, that neither directly nor indirectly is it a question which I am at liberty to entertain in the Prize Court; not pronouncing on the question of law, but declining to enter into that discussion for want of competent jurisdiction. Whether it may be deemed fit to bring forward the question in another Court, where the discussion may regularly be introduced, whether,

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under all the circumstances, of laws not acted upon, but counteracted by an opposite practice, it shall be held that this course of trading is subject to the penalty of our navigation laws, is a question for the consideration of those by whose advice the capture will be directed. The judgment which I shall pronounce, will be to decree that this property shall be restored.

July 18th,
1806.

THE BENJAMIN FRANKLIN (a), WICKS, Master.

(Instance Court.)

Suit for wages.
On the part of
a British pilot,
navigating a
foreign ship to
an enemy's port,
not sustained.

THIS was a suit brought for wages on the part of *J. Gillman*, a *British* pilot, for conducting the ship, being an *American* vessel, from the *Downs* to *Flushing*. The demand was resisted, on a suggestion of a want of skill, in running the vessel on a sand, by which considerable damage was sustained.

On the statement of the case the Court observed.—I should first wish to hear how any suit can be maintained, on behalf of a *British* subject, for services performed in aiding the commerce and importation of the enemy. Is it not a contribution of his skill and experience to assist and promote the navigation of the

(a) The transposition of dates observable in respect to this and some of the following cases, has been occasioned by the extension of the plan originally proposed, for the purpose of rendering the *Collection* of cases comprised in this Number, concluding a Volume, as comprehensive as possible.

enemy's

enemy's ports? That pilots may often engage in such services will be of little signification. They may be disposed to undervalue the obligation of abstaining from all traffic with the enemy, and to risk their own personal safety for the sake of gain. But a Court of Justice will not so consider it, nor give any support to demands arising out of a course of navigation, which must be pronounced to be illegal to a *British* subject.—Costs are asked, but as the owners did not take the objection on which my judgement is founded, by appearing under protest; and since, by that omission, the other party has been led on to defend himself upon the merits, I shall not give costs,

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FRANKLIN.

July 18th,
1806.

THE ROMEO, CORRAN, Master.

Oct. 19th,
1806.

THIS was a question as to the admissibility of the evidence of a letter, applicable to this case, which had been taken out of an *American* vessel, *The Mary*, by Lieutenant *Rigby*, of his Majesty's gun brig *Urgent*, who had stopped that vessel, and had examined her papers, and finding a letter, which purported to disclose the real state of a transaction, which had been fraudulently concealed, had sent the paper in question to the King's Proctor, officially, but without detaining the ship in which it was found.

Evidence—
Paper from on
board a vessel,
not brought in,
if admissible? on
order for further
proof—admit-
ted.

On the part of the Captors.—The *King's Advocate* and *Robinson* stated the circumstances of the case; that this was a vessel under *American* colours, and claimed

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ROMEO.

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1806.

(a) Feb'y 4, 1806.

for Mr. *Corran*, of *New York*, who appeared by the papers to have taken no part in the fitting out, or in obtaining her documents, though he was represented to be in the port from which the vessel sailed. The master represented her to be an *American*-built vessel; but she was described by another witness to have been a *French* or *Spanish* vessel. The instructions appeared to have been given by Messrs. *Noble* and *Arbutnot*, and not by the asserted owner. The charter party was made not in the name of *Corran*, but "for the owner or owners;" under all these circumstances it would be a case requiring farther proof. But a fact had transpired from another quarter, which disclosed the real history of the vessel. A letter had been sent in to the King's Proctor officially, from one of His Majesty's officers who had examined the *American* ship, *Mary*, in her course to *Antwerp*; and finding among the papers, a letter which appeared to disclose the truth of a covered transaction, had taken it from among the rest of the papers, and had sent it in, suffering the vessel to proceed. It is a letter (a) to Messrs. *du Bacque* of *Antwerp*, making communication relative to the ship in question, in the following terms: "Relating to the brig, late *Sophia*, after finding it impossible to procure freight or charter for her under the *Papenburg* flag, expecting that the *English* would shew no kind of discrimination between that Country's colours and *Prussia*, and imagining the risk would be too great to send her off with a load of slaves, we have thought it prudent for the benefit of all interested, to change the colours to *American* and discharge her crew." From this letter which, purports to have been written by Messrs. *Noble* and *Arbutnot*, it appears that this ship, whole

whose present *name* is also mentioned, was in reality a *Papenburg* vessel, which had gone to *America*, where, on receiving intelligence of the *Prussian* hostilities, and the order against *Papenburg* property, she had been put under *American* colours, and had been sent back to *Europe* on freight.

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On the part of the Claimant.—*Arnold* and *Lawrence* objected that this letter was not admissible evidence, That the Prize Act directs every case to be brought to adjudication, in the first instance, on the evidence of papers found on board *that* or any other *captured* ship; and that such has been the rule of practice, Where a vessel is *captured* and brought in, the Court is in possession of all the evidence arising from that *case*. It knows all circumstances relating to the papers *judicially*. But where papers are introduced from extrinsic sources, all collateral circumstances are entirely out of the view of the Court. It has no means of tracing the authentication of the papers produced, nor, in fact, of knowing any thing respecting them.

In Reply it was said, That the direction of the Prize Act contains no negative terms that can be understood to exclude evidence of this kind in particular cases. That, in the standing interrogatories, there is one, in which the question asked, is, “Whether there are, on board *any other ship*, any papers, &c.” which cannot relate merely to ships brought in. In respect to them only it would be superfluous to put such an interrogatory, since those papers must be supposed to be already in the custody and knowledge of the Court, and it would run in other terms, “Whether there are in *this Court* any papers?” There is nothing therefore, in this appli-

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cation, which is contrary to the regularity of proceeding in Prize causes. As to the propriety of the act done by his Majesty's officer in making such a detection, it cannot be doubted that it would be the duty of any officer into whose hands such proofs fell, to retain them. It was an act in which that person could not have a possible interest. He is therefore in all respects a competent person to produce any evidence in his possession before the Court. If it could not be received without bringing the vessel herself to adjudication, for the purpose of putting the papers into the custody of the Court, the consequence would be, that it must necessarily introduce another cause of capture and detention. It might happen that the fraud detected would apply to property of great magnitude, whilst the ship in which it was concealed might be comparatively of small value. In such a case it could not be expected that the Belligerent should forego the benefit of evidence so discovered against the enemy, even if it should induce the necessity of bringing in the vessel. It would be expedient, therefore, on all general considerations, that no difficulty should be thrown in the way of evidence so produced, beyond what may be necessary to establish its authenticity to the satisfaction of the Court.

On the other side it was answered, that the argument from the twenty-third interrogatory did not apply; since the meaning of that enquiry was only to confirm the authenticity of papers regularly produced, and to satisfy the Court that it was in possession of the whole papers that had ever been on board the ship then in judgment before it; and not to hunt into all possible sources of obtaining extrinsic information. There had been no instance in which parties had been

been allowed to advert to papers not brought into Court; and in the practice of invoking evidence from other causes, it had been the rule not to permit invocation from any case till that cause had been heard.

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JUDGMENT,

Sir *William Scott*.—A paper is offered to the Court as evidence in this cause, which, it is contended, cannot be received, *as not having been found on board this, or any other captured vessel*, and *as being*, on that account, not within the regulations of the Prize Act. In the course which I mean to pursue, it will not be necessary to enter into this discussion, because if there is a mode conformable to the act of parliament, and the practice of the Court, the Court would naturally rather adopt that mode, than be led unnecessarily into a consideration of the difficulties that have been stated.

The act of parliament ordains, *that if any doubts arise, the Court may direct farther proof*; but it has not limited *the cause of doubt* to evidence actually on board, nor could it, with propriety have imposed any such restrictions. The Court itself might possess information that would completely falsify the claim. Could it be said, in such a case, that, because the depositions and the formal papers were consistent, there should be no means of extracting the real truth of the facts? Could it be expected that the Court should proceed to judgment on the mere formal evidence, in opposition to its own private conviction, that the whole of what was there stated was false? It would be impossible to maintain that proposition to the utmost extent.

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extent. It must be allowed, then, that there may be instances, in which the Court has the power of calling for extraneous evidence. In acceding to *any* prayer, the Court will undoubtedly be much guided by the nature of the original evidence. But it cannot with propriety be maintained, that the Court is *absolutely* concluded by it. When a case is perfectly clear, and not liable to any just suspicion, the disposition of the Court will certainly lean strongly against the introduction of extraneous matter, and against permitting the captors to enter upon farther enquiries; but in the present instance the case is not free from objection on the original evidence.

The Court may also, I conceive, in the exercise of its discretion, and under the grave responsibility which accompanies all its actions, be at liberty to consider a little the effect of the evidence proposed to be introduced. If it is slight and vague in its nature, the Court will be less easily induced to depart from its usual course. But can it be said, that the relevancy of the paper in question is not material? If there is no doubt that the paper offered was a *ship's paper*, though on board another vessel, which I think there is not, I am of opinion, that it is competent to me, when the evidence is of so stringent a nature as that proposed, to admit it. I accede very much to what has been said, as to the dependence which the credit of papers must have on the circumstances under which they are brought in. But *that* is an observation which affects the question of credibility. This is a paper apparently under the hand-writing of *Noble* and *Arbutnot*, who have been avowedly much engaged in the concerns of the vessel now before the Court—Is not such a paper material? I am of opinion

nion that the Court *is at liberty to have doubts extrinsic of the evidence*, and that this paper may be admitted on an order for farther proof. What I shall do at present will be, to make an order for farther proof, giving the Captors leave to introduce the paper, in such a manner as they may be advised.

The
ROMEO.

On 29th,
1866.

On a subsequent day (a), this cause, came before the Court again, on farther proof, when no explanation being offered of this paper, which had been brought in by the King's Proctor, duly verified by the affidavit of Lieutenant *Rigby*, the Court observed.—This is a paper which stands entirely free from all suspicion of fabrication, since it had been sent in before the capture of this vessel; and, from the particular and circumstantial manner in which it refers to directions appearing to have been given in the charter-party, it is clear that it could not have been fabricated for unfair purposes by the captors. Under these circumstances, and especially when no notice is taken of it in the farther proof, it is to be considered as a paper which verifies itself. All the other papers which have been introduced in farther proof, are *mere formal* papers, which would have been precisely the same if the transaction had passed in the manner described in this uncontradicted letter. There can be no doubt, in my opinion, that the transaction did pass in that manner. Whether the property of this vessel belongs to persons, at *Antwerp*, or *Papenburg*, does not perhaps distinctly appear; but as *Papenburg* was in a state of hostility at the time of capture, *that circumstance is altogether immaterial*.—Claim rejected.

(a) May 3, 1868.

Oct. 30th,
1806.

THE CITADE DE LISBOA, OLEIVERA, Master.

Portuguese treaty—Fraudulent use of the privilege of the Portuguese flag, &c.

THIS was the case of a ship under the *Portuguese* flag and pass, with respect to which, before any claim was given under the treaty, it was intimated by his Majesty's Advocate, that a box of papers had been found concealed, that disclosed a case of gross fraud, and proved the ship and cargo to be *Spanish* property. The case was, on this intimation, put off, that the effect of the papers might be considered by the *Portuguese* Consul.

On this day, the King's Advocate again mentioned, —That this was a ship under the *Portuguese* flag and pass, captured on a voyage to *Monte Video*, and that a box of papers had been discovered, which shewed the property of the ship and cargo to belong to *Spaniards*. That he had been induced to mention this circumstance particularly in the presence of the *Portuguese* Consul, as worthy the consideration of his Government. Because, if abuses of this kind continued to present themselves, it would compel the Court to repeat the observations that had been thrown out in a recent case, with respect to the *Kniphausen* (a) passes; since

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- (b) 1 Aug. 1806. (a) In the case of the *Eendracht* (b) the Court had said—The circumstances that occur in this case will induce me to consider the *Kniphausen* cases with more than ordinary strictness, because it does appear that there have been great abuses tolerated on the part of the persons who have the power of communicating the flag and pass of that state. This vessel had been formerly a *Dutch* ship.

since it appeared also, that the *Portuguese* pass was granted, in the present case, and also in some other instances that had occurred, without the oath of the proprietor.

The
CITADE DE
LISBOA.

Oct. 30th,
1806.

The *Portuguese* Consul said, that he would take care that the observations of His Majesty's Advocate should be represented to his Government.

The Court condemned the ship and cargo.

The master has not thought proper to state the occupation of the vessel, but she appears, from some of the voyages, to have been much in *Dutch* commerce. She has been under the management of persons in *Holland*, and the master does not know either of the owners. It appears also, that he himself is a *Dutchman*, and has never had a domicil at *Kniphausen*. His wife and family are resident in *Holland*, yet the pass describes him "as our subject," and "that he appeared and requested a certificate of his domicil," though it is admitted that he paid nothing for his burgher's brief. It can never be allowed that the Government of *Kniphausen* should communicate the privilege of the *Kniphausen* flag to a *Dutch* ship, navigated under a *Dutch* master, and in the management of a *Dutch* owner.—In the *Kniphausen* fishing vessels (a), it appeared also, that the manner in which the *Kniphausen* documents had been obtained, was liable to observations of a similar nature; and, The Court then intimated, that if such practices were continued, it would be proper that they should be represented to Government.

(a) 18 Sep.
1806.

Nov. 11th, and
20th, 1806.
and Feb. 10, 1807.

THE FLORA, BAPTISTA, Master.

Portuguese treaty—Privilege of flag, how affected, by discussion of property.

THIS was a case of a ship taken under a *Portuguese* flag and pass, and claimed under the treaty. The ship had been a *Prussian* vessel, transferred to the asserted *Portuguese* proprietor subsequent to *Prussian* hostilities (a). The case was ordered to further proof, and on the 18th *February* 1807, it came on again, when it appeared that the vessel had been originally a *Dutch* vessel, transferred to a *Prussian* owner, on the commencement of *Dutch* hostilities, in whose employment she had continued till *July* 1806, when the vessel was lying at *Lisbon*, and was there transferred to *M. De Souza*, under circumstances that appeared to the Court, in the discussion of the further proof, to falsify the whole transaction. The cargo consisting

(a) In the cases of the *Nossa Senhora da Rosario*, and the *Nova Uniao*, 11th *November* 1806.—The *King's Advocate* intimated, that although in some *Portuguese* cases under the treaty, restitution had passed without objection being taken to the fact of their appearing to have been enemies ships transferred to the asserted *Portuguese* proprietor subsequent to hostilities, yet, as the practice of resorting to transfers of this kind, for the purpose of placing the navigation of the enemy under the protection of a *privileged flag*, had been growing more prevalent, and was liable to great abuse, he should hold himself at liberty to argue the point, whether the privilege of the treaty could extend to ships purchased of the enemy, in any case in which it might appear advisable. In a subsequent case, the *Principe Regente* (b), where it was contended in argument, That this point had been settled in cases that had already passed, The Court expressly declared That It did not consider that question to have been decided. That it was a question of great importance, and one that was very fit to be referred for grave consideration. That case was decided entirely on the facts.

(b) 27 Oct.
1807.

of

of salt, on a destination from *Lisbon* to *Rotterdam*, was documented as the property of the asserted *Portuguese* owner. With respect to that, it was contended, that as the *Portuguese* title to the ship had been vitiated, and affected with fraud, it fell back again to the character of a *Prussian*, and consequently, an *enemy's ship*, and under that character would, by the terms of the treaty, render the cargo also liable to condemnation.

The
FLORA.

Nov. 11th and
22d, 1806.

On the other side it was contended, That there had been cases (a) in which the Court had not held the cargo to be involved in the fate of the ship, merely because the *Portuguese* title was not sufficiently established, to answer the interpretation of the law, as understood in the practice of the Courts of this Kingdom.

It was replied, that in cases which related to cargoes, being the property of other persons, it might be so, and very reasonably, since it would be hard to affect them by the latent defects of title in the ship, to which they were in no manner privy. But in a case like the present, where the ship and cargo were included in the same claim, and belonged to the asserted *Portuguese* purchaser, who must be a principal in the fraud, if the pretended transfer was held to be fraudulent, the Court would not give him an opportunity of separating the ship from the cargo, for the purpose of giving a new claim on the property.

The Court assented to these observations, and rejected the claim altogether for the ship and cargo.

(a) So decided also in the cases of the *Zephyr*, 14th April 1807.

Dec. 18th,
1806.

THE CONFERENZRATH, BAUR.

Order, 24th
June, 1803, as
to the colonial
trade—Return
to the country
of the ship—
Hamburg iden-
tified with *Al-*
tona for the
purposes of this
order.

THIS was a case of a *Danish* vessel belonging to *Altona*, which had sailed from *Altona* to *Monte Video*, and was captured on a returned voyage to *Hamburg*, provided that port should not be under blockade, with an alternate destination to *Frederickstadt*.

JUDGMENT,

Sir *William Scott*.—This is clearly a *Danish* vessel. No objection has been raised against the property of the ship; but with respect to the cargo, it is objected that as there appears to have been no *Spanish* licence authorizing these persons to trade at *Monte Video*, it is reasonable to infer that the cargo must belong to *Spanish* merchants. But I think there is enough to be collected from the papers to shew, that persons introducing a cargo would be received, and allowed to export a cargo in return. It appears that the outward cargo produced more than was invested in the returned cargo, and that some part of the money was left in that country. If the commerce of that place had been so far open, that the parties would be at liberty to engage in subsequent adventures, it was not unnatural that the surplus of their funds should be left for another voyage. I am of opinion, therefore, that these objections are not sufficient to weigh against the general current of evidence which represents the cargo to belong to merchants of *Hamburg*; and I shall, on that part of the case, have no hesitation in pronouncing it to be *Hamburg* property.

But

But two questions of law are raised.—It is objected that the ship had been guilty of a breach of blockade on the *outward* voyage, and the terms of the Order in Council of the present war do impose that limitation on the liberty of commerce to the colonies of the enemy (a). With respect to the intention of the parties, it does appear from the charter-party, that there was a design to violate the blockade; but though there may have been the *mens rea*, the parties have had the benefit of extrinsic circumstances turning out in their favour. The blockade was raised before the vessel sailed; so that there is not the *corpus delicti* existing, that would be necessary also to draw upon them the penalties of the law.

THE
CONFERENCE-
RATH.

Dec. 18th,
1806.

(a) 24th June
1803.

The second objection is, that the ship had gone to *Buenos Ayres* and had taken a cargo, with an intention of returning, according to the charter-party, to *Hamburgh*; and it was only on the event of the renewal of the blockade, that the ship was to go to *Fredericksbadt*. It is therefore a *Hamburgh* cargo on board a *Danish* ship, and going not to a port of the country to which the ship belonged, but to *Hamburgh*. It is true, that the rule has been laid down with more precision, and with greater strictness in this war than in the last. It is now restricted to the country of the ship, whereas the former rule extended to the country of the owner of the cargo also. It is not in my power, neither is it my inclination, to relax the strictness of the latter rule by interpretation. But when ports are so nearly conjoined as *Hamburgh* and *Altona*, not merely by *juxta-position* only, but by the closest connexions of familiarity, and commercial intercourse; when they use one common exchange, and when the merchants have their country houses on each side of the river

B B 2

indifferently,

The
CONFERENCE-
RATH.

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indifferently, it would be pressing the rule too harshly on the merchants of *Hamburg*, to hold that they should not be at liberty to enjoy the convenience which *Altona* affords for all the purposes of commerce. I am rather disposed to consider them, as far as the reasonable construction of this order is concerned, as the same port. I shall therefore admit the claim, and pronounce this property to be *Hamburg* property.

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THE ROLLA, COFFIN, Master.

Blockade—
imposed by a
Commander—
mode of notification, through
the Governor of
the enemy's port—
Effect of remission in the mode
of carrying it
into execution,
if proved, &c.
Case of exit.

THIS was a case of an *American* ship and cargo, proceeded against for a breach of the blockade of *Monte Video*, as imposed by the *British* Commander in the expedition to the *River Plata*; and notified at *Monte Video* by communication through the *Spanish* Governor at *Monte Video*.

The case was argued much at length in several arguments. The points chiefly contended on the part of the claimant were: That it was a blockade imposed without competent authority, having originated with Sir *Home Popham* only, and without any communication with his government. That this defect was more conspicuous, from the manner in which the whole of that expedition had been undertaken without orders. Secondly, that the mode of notification resorted to, by communication through the enemy, was vicious in its nature, improperly thrown upon the enemy, and to which neutral nations were not bound

bound to attend. Thirdly, that if the blockade could be held to have had a valid commencement, the fluctuating manner in which it had been from time to time relaxed by the *British* commander, would defeat the efficacy of the measure altogether, more especially as it was at most but a blockade *de facto* only, not aided by any of the presumptions, which had been held to support the continuance of a blockade by notification, till the notification was regularly withdrawn. The blockade originated with Sir *Home Popham*, and therefore a relaxation admitted by him, would justify a supposition that the measure was altogether abandoned.

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JUDGMENT.

Sir *William Scott*.—This ship was taken with a cargo on board, off *Monte Video* on the 20th *November*, 1806, and is proceeded against for a breach of the blockade of that port. When that ground is taken, it must be shewn that there was a competent authority to impose a blockade; secondly, that it was in fact imposed; and thirdly, that it was maintained in such a manner, as to lay upon the parties an obligation of attending to it. If these three points are established, with respect to a ship coming out with a cargo taken on board subsequent to the blockade, the *onus probandi* is thrown on the party, to prove that, though the blockade might exist, there were circumstances that would operate to the release of that particular vessel, exempting her from the penalty of the law.

On the former hearing it was contended that the power of imposing a blockade is altogether an act of

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sovereignty which cannot be assumed or exercised by a Commander, without special authority. But the Court then expressed its opinion that this was a position not maintainable to that extent; because a Commander going out to a distant station may reasonably be supposed to carry with him such a portion of foreign authority delegated to him, as may be necessary to provide for the exigencies of the service on which he is employed. On stations in *Europe*, where Government is *almost* at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different. But in distant parts of the world it cannot be disputed, I conceive, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy, as against the enemy himself, for the more immediate purpose of reduction.

It has been also farther contended, that the commander, in this expedition particularly, did not possess this authority; because it has appeared from the result of a subsequent enquiry into his conduct, that he had acted irregularly in entering upon it without orders. But however irregularly he may have acted towards his own government, the subsequent conduct of government in adopting that enterprize, by directing a further extension of that conquest, will have the effect of legitimating the acts done by him, so far at least as the subjects of other countries are concerned. The government has not disclaimed the acquisitions as obtained *wrongfully*; on the contrary they have recognized his acts by seizing *Maldonado*, and by retaining the footing which had been acquired for them in that country, thereby expressing their

their recognition of the seizure, as a seizure made by the forces of this country validly applied. I am therefore of opinion, that the blockade is not to be impeached on the ground of want of regular authority ; and I have no hesitation in pronouncing that, however irregularly Sir *Home Popham* may be deemed to have acted towards his own government, it is *that* for which he is in no manner answerable to other states ; and that it is not open to the individual subjects of other countries, to dispute the validity of the blockade on that account.

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The second question that arises is, whether the blockade was imposed in a legal form. All that is necessary to make a notification effectual and valid is, that it shall be communicated in a credible manner ; because, though one mode may be more formal than another, yet any communication which brings it to the knowledge of the party, in a way which could leave no doubt in his mind as to the authenticity of the information, would be that which ought to govern his conduct, and will be binding upon him. Sir *Home Popham* came before the place in *June* ; and it appears, by his letters, that he considered the blockade to have been imposed in *June*, though not by notification. Why it was not accompanied with a notification at that time, we are not informed. It would have been more regular, undoubtedly, as indeed it is at all times more convenient, that it should be declared in a public and distinct manner, instead of being left to creep out from the consequences produced by it. On the 23d of *September*, however, it appears that a notification was sent into *Monte Video*. As to all that passed previous to that day, I shall consider it as that to which the Court is in no manner bound

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to attend ; for I think it is evident, from the letters of Sir *Home Popham*, which are produced by himself, that ships had been permitted to pass, and that the blockade, though intended to commence in *June*, had not been kept up with exactness and uniformity. The very expressions requesting the governor to make it known to neutral vessels, do away the effect of all transactions antecedent to the 23d *September*, and I look upon them as wholly unimportant to both parties (a). The notification is made on the 23d of *September*. The usual mode of communicating such intelligence undoubtedly is, *not to the hostile Government*, but to neutral States, and when the more regular form is practicable, it is proper that it should be observed. But here it was not *practicable*. Sir *Home Popham* took the only method that could be adopted, by sending to the governor of the place, and by desiring him to make it known to the subjects of neutral powers, who had no public agents or consuls resident there, to whom it could be more formally addressed. From papers exhibited in another case it appears, that the steps which the Governor took were of the most formal and effectual kind. He summoned all the foreign Ship-masters before him, and among them the master of this vessel. He communicated to them the letter which he had received, and told them that the port was under blockade, and that they must take notice of it at their peril. They were also required to sign a

(c) It had been contended in argument that this particular vessel had run in, in breach of the blockade, and in defiance of the blockading ships.

paper to the effect of that notice, but they refused, that they might not appear to bind themselves by their own voluntary act.

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That this notification was sent and communicated, is established beyond contradiction, by every part of this large bundle of papers, so that it was quite impossible that any person in that port could pretend ignorance of the blockade. It is not without considerable surprise, therefore, that I see the manner in which the master of this vessel, and other persons who have joined in an affidavit with him, have expressed themselves. He says, that some time in *October* a notice was communicated, as he had heard; when it is quite notorious that it was done two days after the notification was received, and in *September*. He says also, that "they were allowed *fourteen* days to come out;" whereas the notification says "*seven*," and "*that he never saw the letter*, and that it was not notified in such a manner as made them consider the place to be under blockade." In direct contradiction to all this, it is abundantly proved by the certificate of the *Spanish* officer, and by the petitions of different neutral masters, that they were convened for the purpose of hearing the letter read, and that the measure itself was perfectly understood by them, since it is recited in direct terms in several of their petitions. The manner in which the mate speaks also, who is the brother of the master, is still more extraordinary. He says, "that he first heard it mentioned on board the ship after their departure from *Monte Video*." This is perfectly incredible. Without observing farther on these inconsistencies, I am of opinion, that the notification was made in such a manner as would legally affect the master with an obligation of observing it.

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(a) *supra*,
Henric & Maritz,
vol. 1. p. 149.

But it is said that the terms of the notification are illegal, as containing an *unwarrantable limitation* of the general rule of law, in "requiring neutral vessels to come out in seven days in ballast, or with those cargoes only on board which they had carried in." It is objected, that the neutral masters were abridged of some of their just rights; namely, that they might bring out also any cargo which had been taken on board previous to the notification; and it is contended that this will have the effect of invalidating the whole proceeding. In support of this argument, a reference has been made to a case (a) in which a notice, irregularly given to a neutral vessel on the coast of *Holland*, by one of His Majesty's officers, was held in this Court to have the effect of relieving that vessel from the penalty under which she had fallen. But no cases can be more distinguishable. That was the case of a vessel warned by a King's officer, off the coast of *Holland*, "that she was not to go into any of the ports of *Holland*," at a time when the port of *Amsterdam* alone was under blockade. Here there is a blockade, properly imposed by a person having authority, and rightly expressed as to the particular port. If there had been an irregularity leading to a mistake as to the port, which was actually placed under blockade, there might have been some ground for expecting relief of the same kind from the Court. But the blockade is good, *pro tanto*; and the Court will not vitiate the effect of it, merely on account of the omission of one of the conditions, under which vessels might be permitted to go out. In that case the irregularity proceeded from an erroneous construction, put upon a public notification of Government, by one of his Majesty's officers. Here it was a restriction imposed by

by the Commander himself, who might possibly find himself under circumstances that would make such a restraint perfectly justifiable, though no such circumstances are stated. I am of opinion, therefore, that the notification was valid in authority, sufficiently notified, and not illegal.

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Then the question comes to this, Whether the claimant can shew any special circumstances that will take off his responsibility of observing it, and relieve him from the penalty of the law. The cargo was taken in after notice, which, under the general rules that have been laid down in this class of cases, is not permitted. But it is contended, that, in the commerce with *South America*, a greater latitude must, in equity, be allowed, from the nature of that trade. That the object of the voyage is principally to obtain a returned cargo, and on that account a liberty to go in should imply a liberty to come out with a cargo. That the cargo consists chiefly of *hides* and *tallow*, and other articles of which, in warm climates, it would be necessary to defer the shipment till the last moment, for their better preservation. That the return being in goods of that description, a possession in warehouses as to them, should be taken as equivalent to the possession by shipment, to which the Court has confined the liberty of coming out with a cargo, in other cases. I do not feel myself warranted to accede to the consequences of this mode of reasoning. The trade to the colony of the enemy is not one that is entitled to considerations of peculiar indulgence. It is one not ordinarily open, but allowed only by the enemy, as a relaxation for the *relief* of their distresses proceeding from the war. It is a trade, therefore, which persons resorting to it for their own extraordinary profit and advantage, must be content to take,
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with all the consequences attending it. I do not feel that there is any just call upon me to distinguish in their favour, or to depart in this particular case from those rules which the Court has felt itself under the necessity of laying down, to prevent the continual danger of being imposed upon by *particular evidence*, if it was to permit the exemption to be carried further than to *a delivery on board the ship, or in lighters*. I must therefore reject that plea.

It is then said, that there are other circumstances that will defeat the operation of the penalty, namely, that the blockade was irregularly maintained by the blockading force, in suffering some ships to go in, and others to come out, which would tend to deceive other persons, and would therefore vitiate the effect of the notification. And I confess, if I was satisfied of the fact that such instances did occur, I should be disposed to admit the conclusion, that such a mode of keeping up, or rather of relaxing the blockade, would altogether destroy the effect of it. For what is a blockade, but a uniform universal exclusion of all vessels not privileged by law? If some are permitted to pass, others will have a right to infer that the blockade is raised. If it was shewn, therefore, that ships not *privileged* by law have been allowed to enter or come out, from motives of civility, or other considerations, I should be disposed to admit that other parties would be justified in presuming that the blockade had been taken off.

A list is exhibited of the number of instances in which this is said to have occurred. The first two are of the date of the 20th of *September*, previous to the notification, and therefore may be put out of the question. The next is the *Minerva*, which appears
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to have been guilty of no breach of blockade whatever. That vessel had been detained and examined; but was driven in by the violence of the storm, and is therefore no instance of a liberty given by Sir *Home Popham* to go in. The rest that follow are slave ships, with respect to which it appears that Sir *Home Popham* had come to the humane resolution of permitting them to pass. It would have been better, undoubtedly, and more regular, that this intention should have been notified to the governor in the same manner as the blockade itself. It would then have been a clear and distinct limitation, and the exception would have been understood according to its proper limits; because slave ships are in no manner privileged by law, or put upon a different footing from other ships. Instead of using that precaution, an endorsement is marked upon their papers, of which it is properly observed, that though it begins by reciting a particular *reason*, as a want of provisions which had appeared in one instance, it lets itself out to a general liberty to *all slave vessels*; and it is besides left open to accident, whether such endorsements would come to the knowledge of other parties or not. It appears that only one slave ship, the *Betsy*, did enter; and I think it could not remain a secret on what grounds she was permitted to go in. It would naturally become a subject of inquiry. The endorsement would be seen, and it would be known that this was a particular exception, granted in commiseration of the number of human beings who were on board in distress. Three other ships of the same description, that had been permitted to pass, were driven off by the order of the *Spanish* Governor. With respect to these, it could not be supposed that they were general-
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merchant vessels. It would rather suggest itself to persons in port that they were driven off as vessels of war employed on some hostile stratagem, and therefore it could not have resulted from the permission given to them, that any mistake was raised in the minds of the *Spaniards*, or of neutral masters, respecting the continuance of the blockade.

Then it is said, that some were permitted to go out; but the fact is, as far as I understand it, that *none* were permitted to come out. Several that attempted to go out were seized and detained, and afterwards liberated. The consequence is very different, whether they were permitted to proceed unmolested in the first instance, or whether the commander, having seized *all*, and afterwards finding himself under particular difficulties in retaining possession of all, selects a certain number, which he conceives to be the least favourable, and dismisses the rest. That appears to have been the situation of Sir *Home Popham*. He found himself in want of men, and was therefore under the necessity of releasing some. If this selection had been exercised in the most capricious manner, it would give the *Rolla* no right to complain. If a captor has detained A. and B. is it not an act of injustice to A. that he releases B.? It can be no renunciation of the blockade, or of any other right of war, as to him. It is no more than an exercise of discretion in the commander, under circumstances which render that discretion perfectly justifiable. There are other circumstances, on which some stress has been laid—that Sir *Home Popham* did, in a manner, release this vessel, and resumed possession again. How does that fact turn out? Sir *Home Popham* withdrew his men, but the papers were detained, and the ship herself was within
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the pale of the fleet. He declined to give any answer till Admiral *Stirling* arrived, who had been appointed to succeed him. Admiral *Stirling*, it appears, on his arrival, declared the blockade to be *at an end*; but that could have no operation as to its previous existence, nor affect a case that was already in the possession of the law. As to Sir *Home Popham*, how does it stand? It is said, that he offered to release, on bond, to abide adjudication; but that is rather an assertion of his right. It is a bringing in for adjudication, but in another form. It is objected, that he had declared the fate of the *Rolla* should depend on the fate of the *Pigou*, which has been restored, it appears, by consent. If such a declaration was made under an erroneous understanding of the law, or of the fact, it will not bind him, much less the Court that has to decide upon the legal effect of the circumstances under which this vessel was taken. If the fact was, as it has been suggested, that the cargo of the *Pigou* appeared to have been taken on board previous to the notice, there was a very reasonable ground for the consent that has been given in that case. I am of opinion, therefore, that the blockade existed under competent authority; that it was notified in a credible manner; and that it came to the knowledge of these parties in such a way as must bind them; that no circumstances occurred to invalidate the notice previous to the capture; and that nothing which happened since can have the effect of relieving this ship and cargo from the penalty of *condemnation*.

June 10th,
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THE CHRISTIANSBERG, VANDERWEYDE, Master.

Orders of Council,
Jan. 7, 1807.
Effect of fraudulent evasion on
the subsequent voyage.
Limitation, to
the voyage immediately subsequent, &c.

THIS was a case of a ship which had sailed in February 1807, with a cargo of cheese and butter from Rotterdam, ostensibly for Smyrna, but had put into Alicant, as asserted, in distress. The outward cargo was there sold, and another cargo taken on board, with which the vessel sailed on a destination to Copenhagen, and was captured on that voyage. A claim was given for the ship and cargo on behalf of Mr. R. Rugge of Altona.

On the part of the Captors, the King's Advocate and Laurence contended,—That the plea of distress was falsified by the manner in which the entries appeared to be made in the log by interlineation; that the original voyage was to be considered as in breach of the instructions of the 7th of January, and under false papers; that in analogous cases of blockade, a vessel that had violated the blockade inwards, was still liable to capture on her returned voyage (a), though in a situation otherwise innocent, viz. even though she was coming out in ballast.

On the part of the Claimant, Arnold and Adams argued in support of the alleged excuse, under which the vessel had gone into Alicant, that it was corroborated by all the witnesses in the cause; and contended,

(a) So decided in the *Wack/amkeit*, 31st July, 1807; also *Infrusion*, 5th August; also in more ancient cases—the *Jonge Fredericus*; the *Good Hope*, 15th October, 1799; agreeable to the *dictum* in the *Frederick*, *Molke*, vol. i. p. 56.

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that the former voyage was to be taken as terminated; and that there was no instance in which the principle of affecting *the proceeds* of a noxious voyage had been applied to a case like the present. Ships coming out in ballast had indeed been condemned, for a breach of blockade inwards, in cases of *blockade, properly* so called, and of *specific ports*, but there the actual breach of the blockade continued to the returned voyage, except as far as a relaxation had been admitted in favour of vessels in ballast: When that relaxation was withdrawn, as forfeited by the fraudulent conduct of the vessel in going in, the case fell back into a state of delinquency attaching on the outward voyage. The same reasoning could not be applied to this case. The present voyage was perfectly innocent, even under the order of the 7th of *January*. The principle of affecting proceeds, for offences imputed to the former voyage, was a new principle, and must be applied with great disadvantage to the claimant. The alleged delinquency must in all cases be a remote act, not falling within the scope of the evidence usually required to be produced, respecting the transaction in which the capture is made. The claimant would therefore be taken by surprise, and would be necessarily unprovided with evidence, by which he might have it in his power to repel the charge imputed to him.

JUDGMENT.

Sir *W. Scott*.—The first point to be considered in this case is the matter of fact on which the question of law is raised. It is a new question undoubtedly, but supported by such considerations, that if the facts

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are established, I shall feel no hesitation in pronouncing, that they are sufficient to subject this ship and cargo to condemnation. It appears that the vessel had come out of *Rotterdam* under the benefit of that indulgence, or limitation of the order of the 7th of *January*, which directs that the restriction should not be applied to vessels going to a *neutral port*. To avoid the effect of this order, an ostensible destination was assumed "*to Smyrna*;" but, as I collect from all the circumstances of the case, without the slightest intention of going to that port. The ship went to *Alicant*, as it is asserted, under distress, and there the former cargo was disposed of. The mate and the master have been examined, and the account which they give of the deviation is, "that they met with bad weather, which obliged them to put into *Alicant*, where the master sold the former cargo, and repaired the ship, and purchased another cargo." This is the result of the depositions, *that it was merely an act of necessity*; and if that is proved, a clear necessity will be a sufficient justification for every thing that is done, *fairly and with good faith*, under it.

An appeal has been made to the papers, but they appear to me to afford but very inadequate support to this representation. The protest of the master is made on the 19th of *February*, the very day on which the bill of lading for the present cargo was signed. Masters are usually ready enough, and rather impatient, to enter their protests, and very properly, on the first opportunity. But in this instance the master seems not to have thought of this important act, till the vessel had been in port a considerable time, when the transaction of the former cargo was completed, and when he was preparing to sail on the present voyage.

The protest states, "that on the 2d of *February* a land gale came on, which broke their mizen-mast and jib-boom, &c." This would be a considerable damage, if true, and might perhaps be such as would justify the unlivery of the cargo; though it is not every slight damage that *will justify* a master in *unloading*, in an interdicted port, into which he may be obliged to put for the purpose of undergoing slight repairs, if those repairs could be effected without disturbing the state of the cargo on board.

The account which is entered on the log is something different; It is there stated, "that the bowsprit and mizen-mast broke," though there is nothing in the preceding entries respecting the weather, which points in any manner to such an accident. It goes on through the next day stating, "that the weather was *overcast*, that several ships were in sight;" and then again, "our main-sail went to pieces," in the same sort of unpremeditated way, if I may so express it. The next day the weather continues as before, but it is not described in such terms as would induce us to suppose that any apprehensions of danger were entertained. They met a *Danish* frigate, and saluted with colours; but no mention is made of communicating their distress, as would be natural, for the purpose of asking assistance from a man of war of the country, to which the vessel belonged. There is no representation of any such conduct. The entries in the log are continued in nearly the same strain, till we come to something like an insurrection of the crew, but which is not mentioned in the protest, "*our men compelled me to run into Alicant, on account of the loss of the mizen-mast and bowsprit.*"

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This representation is so much at variance with itself, that it amounts, in my estimation, almost to a direct contradiction. The weather is not described to be such as would be likely to raise an apprehension of danger to their lives, or of injury to the vessel. There were five or six other ships in sight, and yet there is no mention of any application being made to them, nor even to the *Danish* frigate the next day, whose duty it would certainly have been to afford assistance. Then comes the last entry, as to which, whatever may be said of other passages, I defy any person to look at these words, "*obliged the master to run into ALICANT,*" without seeing that they are interpolated and entered at a different time. The charges for repairs done at the port of *Alicant* amount at last, it appears, only to *eighty dollars*. In answer to this objection, it is said, that the principal repairs might be deferred, as *Alicant* might not afford an opportunity of having them done completely; as if the great port of *Alicant* was not equal to the repairs of a vessel of ninety-three tons. Could any affidavit be sufficient to obtrude the belief of this excuse on the most credulous mind?

However, the repairs, such as they are, being finished, the vessel makes no attempt to go to *Smyrna*, but sets out again on a voyage to *Copenhagen*, to the *North Sea*. Taking all these facts together, I have no hesitation in pronouncing that the evidence of the log is sufficient to convince me that the excuse set up for running into *Alicant* is false. It is said that the log was not produced by the claimant, and could therefore not be fabricated for purposes of fraud. But if it is to be taken as falsified by the *prepared* or *interpolated* state in which it is exhibited, I think I may assume that
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the purposes for which that was done were fraudulent.

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Then comes the question of law, Whether the ship is not, under such circumstances, liable to condemnation? It is, as already noticed, a new question of considerable importance; and more particularly if it is viewed in the extent of the consequences, to which it may lead, as connected with the present restricted state of commerce. I am to consider, first, the situation in which the ship was shut up at *Rotterdam*. She was in fact blockaded in the port of *Rotterdam*, and could not come out with a cargo, unless going to a neutral port. The permission to go to a neutral port, if accepted, implies a contract that that destination should be *bonâ fide* pursued. The vessel avails herself of the indulgence, and comes out with a professed intention of acting conformably to the order. But the fact turns out afterwards, that she deposits her cargo in a port, to which she would not have been permitted to go, if the real intention of the voyage had been disclosed. This is unquestionably an act of perfidy; and I ask, by what means can the order be maintained, or such a conduct be repressed, unless by the application of the penalty to the subsequent voyage? Until the vessel had actually entered the interdicted port, nothing appeared, whether she was *in delicto*, or not. Cruizers see nothing; She goes in, and then the offence is consummated, and the intention is for the first time declared. It is not till the vessel comes out again, that any opportunity is afforded of vindicating the law, and of enforcing the restriction of this order. It is objected, that if the penalty is applied to the subsequent voyage, it may travel on with the vessel for ever. In principle, perhaps, it might not unjustly

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be pursued further than to the immediate voyage (a). But we all know that in practice it has not been carried *further*, than to the voyage succeeding, which affords the first opportunity of enforcing the law. I shall, therefore, on these grounds, pronounce the ship and cargo subject to condemnation.

Prayer for the matter's private adventure, which was considerable, refused.

(b) Parkman v.
Allen, Stair's
Decis. vol. 1.
p. 529.

(c) 23d Feb.

(a) So in an old case recorded in the Reports of the Court of Session in *Scotland*. "That the ship was taken in her return, having taken contraband to the enemy in that voyage, which is founded upon evident reason, because, that whilst ships are going towards the enemy, it is but an intention of delinquency against the King, in assisting his enemies; but when they have actually gone in and sold the contraband, it is *delictum commissum*; and though it might infer a quarrel against the delinquent, *when- ever he could be found, yet the law of nations bath, for the freedom of trade, abridged it to the immediate return of the same voyage, because quarrels would be multiplied upon pretence of any former voyage (b).*"

Agreeable to this distinction, in the *Randers Bye (c)*, captured on her course from *Cette* to *Randers*, it appeared that the voyage immediately preceding had been from *Marfeilles* to *Cette* in ballast, but that the voyage preceding that had been from *Almeira* to *Marfeilles*, with ostensible papers to *Trieste*. It was argued, on the authority of the *Christianberg*, that the effect of the former fraudulent destination would render the vessel liable on this subsequent voyage, more particularly as the voyage pretended to have been interposed was but of very short extent, and only a mere passage from one port of the same coast to another, for the purpose of taking the cargo on board. On the other side it was contended, that the circumstance of an intermediate voyage, though in ballast, raised a ground of material distinction, inasmuch as it had afforded an opportunity of vindicating the law by capture on that voyage; that the Court had not extended the penalty farther than to the next subsequent voyage, and would not be disposed to extend it. *See decreed.—Restitution.*

THE HOFFNUNG, HARDRATH, Master.

May 18,
1807.

THIS was a case of a demand of average on the part of the Admiralty, against a *Swedish* ship seized in the port of *Ilfracomb*, on account of the cargo, which was seized and condemned as *Prussian* property, on the breaking out of *Prussian* hostilities. The demand was to recover against the ship, the value of part of the cargo, which had been applied to the reparation of the vessel in the port of *Ilfracomb*, before the seizure. The ship had been restored, on bail given to answer the adjudication on this reserved question.

Average against the ship, on the part of the captors, in right of the cargo, as demanded, for part of the cargo applied to the repairs of the ship—not sustained.

JUDGMENT.

Sir *W. Scott*.—This is a claim of average against the ship, on the part of the captors of the cargo, which has been condemned as *Prussian* property. The vessel had been brought to *Ilfracomb*, and was there detained, but before the seizure, some part of the goods had been sold by the master to defray the expences of the repairs of the ship, and that account was closed before the seizure. The monition was first taken out *against the ship and the goods seized*, and properly, because it could not be against the cargo generally. The law of war operates by force, and cannot be extended beyond that which is the object of practical seizure, as a tangible object, which those parts of the cargo which had been sold clearly were not. If the term cargo was introduced afterwards in the subsequent stages of the proceedings, it is to be interpreted in the same sense, *of the cargo actually on board*, and cannot

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be taken more generally, as embracing the whole cargo, or as meaning to enlarge the object of the proceedings, beyond what was on board at the time of seizure.

When the condemnation passed, it was not improperly suggested in argument, that there might be a demand of average or contribution against the ship, and that question was reserved. The registrar and merchants have reported what *would* be the sum due, if on the point of law any thing should be held to be due ; and that is the question which the Court has now to determine.

It is a case, as far as my experience goes, *prima impressionis*. I do not recollect any instance of a demand of this nature, and in *this* I am confirmed by the recollection of the registrar. Cases of average on the part of the ship against the cargo are not unfrequent, but a demand of the cargo against the ship is perfectly novel in this Court. The distinction is obvious. The right of war, is a *right in re*, and the Court of prize accordingly attends only to the *res ipsa*, and the *onera* attaching on the property in right of possession. The ship has the possession of the cargo, which the master is not bound to deliver, till he has been satisfied for his demand of average, if he has such, in the same manner, as for his demand of freight. He has the *res ipsa* in his possession, and may legally detain it.

The captor succeeds to the rights of the owner of the ship, when that is condemned, and may detain the cargo also, in virtue of these rights when they exist. But with respect to the cargo, it is very different. That has not, in any manner, a right of possession

sion against the ship ; it may have the *jus in rem*, possibly, but it has not the *jus in re*, and consequently no right of detention existing at the time of seizure. If there is any demand on that side, it must be enforced by a new process ; there *can be no* detention, and consequently no right of detention. The demand must be of that description of interests only, which are collateral, and *extrinsic*, and which are to be enforced on principles of law of another species and by a new process. They are not tangible objects, to which the hand of war can be applied, and therefore the Prize Court will not take notice of them. Indeed, how could the claim of the cargo against the ship be enforced in this Court ? If the ship goes into the country of the owners of the cargo, it may be reached by process of another kind ; but only in virtue of an implied contract in law. That is the state of this demand, it is one that could be enforced only in the country to which the *parties belong*.

It has been said in argument, that the captor succeeds to all the rights attending the property, and that he is subject to all the obligations belonging to the property seized. But this is not an accurate description. It is not, I conceive, a complete representation of all the interests and obligations of the proprietors that is devolved by act of seizure on the captor. The right of capture attaches, according to the state in which the property is found ; but if a former freight is due to the ship, the captor could not exact it, since he has not earned it. The owner of the ship has parted with his lien, and must look to his remedy of another species. Neither does the captor become subject to the obligations to which the owner is liable. Antecedent collateral contracts, as bottomree, may exist,

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exist, that will not affect him; he becomes possessed of the *res ipsa* but without being made liable to the personal contracts, in which the proprietor is engaged. Therefore, unless it can be shewn, that the hand of capture was employed on these goods in quality of cargo (a), the Court cannot go back to affect them in any other character. This cannot be maintained. The ship had been totally restored, and part of the cargo had been converted before seizure. What has become of it the Court will not enquire, nor look back to rights of this extrinsic nature.

If the whole cargo had been applied to the repairs of a ship in a foreign port and incorporated with it, and

(b) *March 15,*
1808.

(a) This principle was exemplified in the case of the *Charlotte* (b) an American vessel, which had sailed from America, with a cargo of pitch and tar to the *Cape of Good Hope*, under a false destination to *Madras* and a market in *India*. The vessel had arrived at the *Cape* a short time prior to the capture of that settlement by the *English* forces.—The chief part of the cargo had been sold to the *Dutch* Government. The proceeds had been deposited, by the master in the hands of a merchant at the *Cape*, as his agent there, and one hundred kegs of butter, and eighty boxes of soap, had been purchased and shipped by the master, on the joint account of himself and the co-owner in America. On the surrender of the *Cape*, the vessel and the goods on board were seized, and a bond was taken of the agent to abide adjudication on the value of the proceeds of the cargo sold to the *Dutch* Government. There being no Vice Admiralty Court at that time at the *Cape*, the case was brought before the High Court of Admiralty, when the Court condemned the ship, and the goods on board belonging to the owners, as implicated in the act of carrying contraband to a settlement of the enemy with false papers, which would affect even the returned voyage (c). But the Court held the proceeds of that part of the cargo, which had been delivered, and had not been subject to seizure, to be not amenable to the jurisdiction of the Court, and dismissed that part of the case.

(c) *Rosalie* and
Betty, *supra*,
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the

the vessel had afterwards become prize, the captors might have had the benefit of that conversion, yet they would not have been subject to any demand on that account; still less could they in that case say, you must find me a cargo, when in fact they had received it in the amelioration of the ship. So in this case they are not entitled to demand the proceeds of a cargo applied in the repairs of the ship. I am of opinion, therefore, that the debt, if it is to be so called, due from the vessel to the owner of the cargo, is amongst those *onera*, which the Prize Court does not notice, and that the claimant of the ship is entitled to his dismissal.

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THE LISETTE, STEG, Master.

Dec. 5th, 1806,
and July 2d,
1807.

THIS was a case of a vessel which had sailed from the *Elbe* to *Tonningen* under a charter-party, to take on board a cargo of goods from *Malaga*, which were to be sent from the *Elbe* in lighters. The goods were accordingly so shipped, and sailed on the 6th of *September*, and were captured on the 26th, after the blockade of the *Elbe* had been notified to be withdrawn, on the 25th *September* 1806.

Blockade—
Penalty dis-
charged by the
raising of the
blockade be-
tween the time
of sailing and
the capture.

On the part of the Claimant, *Arnold and Robinson* contended—That the *corpus delicti* no longer existed at the time of capture; that the law being at that time altered or annulled, the penalty could not attach; that on a similar principle the Court had held a sailing on a design to trade with the colony of the enemy, to be discharged from the penalty, by the change of the character of the colony prior to the seizure (a). In the same manner the sudden cessation

(a) *Abby*, *supra*,
vol. 5. p. 254.

of

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of hostilities would extinguish the right of seizing vessels absolutely the property of the enemy. By parity of reasoning, neutral vessels implicated, by the act of sailing in a violation of the laws of war, must also be exonerated from the penalty of the law by the *cessation of hostilities*, or, which was the same thing, by the ceasing of the offence, or of the *law*, by which the offence was created. Whatever the intention of the parties might have been, if the state of affairs, existing at the time of capture, was so changed, as not to support the *corpus delicti*, the penalty would not attach.

On the part of the Captors, the King's Advocate and Laurence contended—That the offence was completed by the act of sailing, and it had been determined, that the breach of blockade incurred by sailing, was not discharged till the termination of the voyage. In this particular instance the terms of the blockade (a) were such, as looked as much to the destination of the vessel to the enemy's port, as to the immediate act of sailing from the *Elbe*. That the effect of such a destination to *Spain*, which was intended to be prevented, was still in operation at the time of capture, and it could not therefore be contended that the with-drawing of the blockade of the *Elbe*, after sailing, could amount to a discharge of the *penalties* attaching on the prohibited voyage, which was still existing, as a prohibited voyage, in its latter term, at the time of capture.

(a) Order, 16
May, 1806.

In reply, it was contended—That the place of destination was introduced only as a restriction, or *limitation*, on an exception, which had been allowed to voyages

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to neutral ports. That the offence of breaking the blockade could not be tried by any other considerations than those applying to the *exit* from the blockaded port. To extend it to the remote consequences of an ultimate destination, would be to give some ground to the cavils of the enemy, who attempt to confound the doctrine of blockade with general interdicts of entire coasts and countries by proclamation, and without the application of actual force, on which the system of blockade, maintained by this country, has in reality been founded. That if this was the correct view of the offence, as confined to the exit from the blockaded port alone, it would be impossible to distinguish it from the other cases above alluded to, in which the existence of the *corpus delicti*, at the time of seizure, was held to be necessary to justify the application of the penalty.

On the 19th *December* the Court directed this vessel to be restored.

On the 2d *July*, 1807, the case was brought before the Court again, in respect to the cargo, when *The King's Advocate and Laurence* contended—That the question of blockade was still open as to the cargo; that the ship had been restored on considerations peculiar to that part of the case, as having not carried out any goods from the blockaded port; that the cargo had been water-borne out of the blockaded port, and had, therefore, been guilty of a breach of the blockade; that the delinquency of breaking a blockade had frequently been declared to continue till the termination of the voyage; that in sailing *towards* a blockaded port, where the offence rested in intention.

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intention only, it might, perhaps, be absolved by the raising of the blockade, during the voyage, because the offence had never been carried into effect. But that, in the present case, the whole offence had been completed, and must be held still to exist as a ground of condemnation till the termination of the voyage.

On the part of the Claimant, Arnold and Robinson contended—That the question of blockade had been fully agitated on the former hearing, and that the restitution of the ship had passed on that question only; that the distinction between the *intention* on the inward voyage, and the *offence of having actually sailed out*, would not avail, because it had been frequently determined, that the act of sailing *for a blockaded port*, was something more than mere intention. It was considered as an overt act, by which the delinquency was fully incurred. There was therefore no ground for any distinction between cases of sailing *towards*, or *from*, a blockaded port, with respect to which the blockade itself had been relaxed. The return of peace before capture, would enure to the protection of all vessels, that had actually sailed in a state amenable to the right of war. The right of war would be extinguished against them, though the ship or cargo had been liable at the time of sailing, as the property of the enemy, or on account of the contraband nature of the trade (a).
That

(b) Aug. 5, 1807.

(a) A question of this kind has since (b) occurred, and received the decision of the Court, in the case of the *Trende Sofre, Miffen*, a Danish vessel claimed for the Royal Danish College of Commerce, captured May 14, 1806, at the Cape of Good Hope, where the vessel had touched, on an ulterior destination to *Tranquebar*, with a cargo of cordage, and tar, gin, iron, and wine, and

That the penalty could not, in this instance, continue longer than in other analogous cases where *the right* of

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and with dispatches on board from Mr. *Schimmelpenninck*, the Minister of State in *Holland*, for Governor *Jensen*, at the *Cape of Good Hope*. The vessel arrived at the *Cape*, after that settlement had surrendered to the *British* forces, and was there seized as prize. On the part of the Captor, the *King's Advocate* and *Arnold* contended, that a vessel was not at liberty to go to an enemy's port, having articles of contraband on board, under an asserted intention of proceeding on an ulterior destination. That though the settlement had become *British*, the penalty would not be defeated, as the intention and the act continued the same; that there was no case in which such a distinction had been allowed on the question of contraband. The distinction, which had been admitted in blockade cases, stood altogether on particular grounds, as arising out of a class of cases depending on the blockade of neutral ports, in which the Court had expressed a disposition to admit all favourable distinctions. This, on the contrary, was an offence of a noxious nature, and not entitled to any indulgence.— On the other side *Lawrence* and *Stoddart* adverted to the facts of the case, as tending to exculpate the *Danish* College of Commerce from any intention of delivering the naval stores at the *Cape*, or from being privy to the conveyance of the *Dutch* dispatches, and contended, that, on the interpretation to be put upon their acts, it might be a question, whether a great commercial company, trading under the authority of its own government, and sending out stores for the *Danish* settlements in the east, could justly be *restrained*, on the same terms as individuals, from touching at an enemy's port for provisions, notwithstanding there might be on board articles that could not be carried to that port for sale? That the declarations of a public company, as to its intentions, were more entitled to credit and respect than the declarations of individuals; that, with respect to any forcible application of such articles to the use of the enemy that might be apprehended, there was also less danger that such a constraint would be put upon them, when going in that manner under the special protection of the state. That this question was rendered unnecessary, however, by the date of the capture, which did not take place till the 14th *May*, 1806, when the *Cape* was in *British* possession. That the offence of carrying such articles to

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(a) The *Abby*
and the *Lisette*,
see supra.

of war violated had itself ceased to exist before the time of capture.

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an enemy's port was no longer in existence. The delictum was done away, as the Court had held in analogous cases (a). That the Judgment of the Court, in the blockade cases, was strictly in point, and did not stand on special grounds of lenity and forbearance, but on the just application of a general rule of law.

On the topics here stated, The Court observed, " If the port had continued *Dutch*, a person could not, I think, have been at liberty to carry thither articles of a contraband nature, under an intention of selling other innocent commodities only, and of proceeding with the contraband articles to a port of ulterior destination. But before the ship arrives, a circumstance takes place which completely discharges the whole guilt. Because, from the moment when the *Cape* became a *British* possession, the goods lost their nature of contraband. They were going into the possession of a *British* settlement; and the consequence of any pre-emption that could be put upon them, would be *British* pre-emption. It has been said that this is a principle which the Court has not applied to cases of contraband; and that the Court, in applying it to cases of blockade, did it only in consideration of the particular hardships consequent on that class of cases. But I am not aware of any material distinction; because the principle on which the Court proceeded was, that there must be a *delictum* existing at the moment of seizure to sustain the penalty. It is said that the offence was consummated by the act of sailing, and so it might be with respect to the design of the party, and if the seizure had been made whilst the offence continued, the property would have been subject to condemnation. But when the character of the goods is altered, and they are no longer to be considered as *contraband*, going to the port of an enemy, it is not enough to say that they were going under an *illegal intention*. There may be the *mens rea*, not accompanied by the act of going to an enemy's port. I am of opinion therefore, that the same rule does apply to cases of contraband, and upon the same principle on which it has been applied in those of blockade; I am not aware of any cases in which the penalty of contraband has been inflicted on goods *not in delicto*, except in the recent class of cases respecting the proceeds of contraband carried outward with false papers. But on what principle have those decisions been founded? For why, when the right of capture having been defrauded in the original

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Sir W. Scott.—This ship was taken on a voyage from *Tonningen* to *Malaga*, but a voyage accompanied with this fact that she had gone from *Hamburg* to *Tonningen*, under a charter party formed at *Hamburg* for this ulterior voyage, and had there taken on board the cargo, which was brought from *Hamburg* in lighters. The Court has already restored the ship. But it is said that this passed on grounds which will not apply to the cargo; that the ship had gone from *Hamburg* in *ballast*, but that the goods are to be considered as taken in one uninterrupted voyage, commencing in an actual breach of the blockade, and continuing as the same identical shipment, on the original destination, from the blockaded port to *Spain*.

It is impossible not to feel, with some concern, for the restraints which the necessities of war, as arising out of the political state of the world, have compelled this country to impose on neutral trade, in the system of blockade, as it is now applied to a great part of the coast of *Europe*, to the ports of friendly states, whose merchants are continually making applications, that are favourably attended to by the Government of this country. It is extremely desirable that questions of this nature should find their way to the ultimate judg-

original voyage, the opportunity should be extended to the returned voyage. Here the opportunity has been afforded till the character of the port of destination became *British*. Till that time the liability attached; after that, though the intention is consummated, there is a material defect in the body and substance of the offence, in the fact, though not in the intent. I am of opinion that it is a discharge, and a complete acquittal, that long before the time of seizure these goods had lost their noxious character of going as contraband to an enemy's port.

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(a) *Supra*,
p. 204, note.

ment of the Court of Appeal ; and that the principles which this Court has thought itself warranted, under occasions of peculiar difficulty, to lay down may be corrected or affirmed. In blockades of this description, which are applied to the ports of neutral and amicable states, I feel it to be my duty to press them as lightly as possible ; yet I have been compelled in principle to hold, that when goods are brought down from the *blockaded* port to a neighbouring port, on purpose to be shipped for the enemy's country, an adventure so conducted is nevertheless a breach of the blockade ; how far that principle will be affirmed by the superior Court I cannot say. This ship however has been restored, on grounds that have been stated in argument. The distinction which is now taken between the case of the ship, and the cargo, cannot I think, be sustained. In the former case of the *Charlotte Sophia* (a), both the ship and the cargo were condemned ; and this ship had been engaged in precisely the same course of trade. The master had taken on board the cargo, knowing it to have come from *Hamburg*, in breach of the blockade, and under an engagement to carry it on to the ultimate port of illegal destination. One visible distinction of fact between the two cases is immaterial, viz. that this vessel had gone from *Hamburg* in ballast, whilst in the former case, the ship had a few articles on board, though the bulk of the cargo was, in that case also taken in at *Tonningen*. There is no doubt then, that this vessel must have been condemned upon the authority of that case, unless one other material distinction of fact had existed, leading to a rule of law to which the Court is strongly disposed to adhere—It is this, that this vessel was not captured

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captured till the blockade had ceased. It is said that the offence was consummated by the act of sailing; so it is in a certain sense. But the ship was not *taken in delicto*, and I have not had any case pointed out to me, in which the Court has pronounced an unfavourable judgment on a ship seized for the breach of a *by-gone* blockade. I know of no such case; and certainly the same reason for rigour does not exist; because the blockade being gone, the necessity of applying the penalty to prevent future transgression cannot continue. That was the ground on which my opinion was formed, in restoring the ship, though I did not then express my reasons for that judgment, in a case that came on at the conclusion of a very long and laborious sitting. It is true, as has been observed, that the offence incurred by a breach of blockade generally remains during the voyage. But That must be understood as subject to the condition, that the blockade itself continues. When the blockade is raised, a veil is thrown over every thing that has been done, and the vessel is no longer taken *in delicto*. The *delictum* may have been completed at one period, but it is by subsequent events entirely done away. On these considerations I pronounce that this cargo is not subject to condemnation on the ground of the blockade.

Further proof ordered of the property.

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THE MINERVA, KNUTTTELL, Master.

*P. v. Case of a ship
of war from the
enemy, whilst
lying in a neutral
port to which it
had fled for re-
fuge, &c. Invalid.*

THIS was a case of a vessel under *Kniphausen* colours, and claimed for Count *Bentinck* Lord of *Kniphausen*, as a ship lately purchased by him in April, 1807, in the port of *Bergen*, and coming, as it was asserted, according to his directions, to the river *Jade*, the port of *Kniphausen*. It appeared, that at the time of the capture the vessel was sailing towards the *Tenel*, and about ten or twelve miles from the coast of *Holland*; that she had been a *Dutch* ship of war, belonging to the *Dutch East India Company*, that had been chased into *North Bergen*, after an action with a *British* frigate at the beginning of the war, and had been lying in that port ever since.

On the part of the Captors, the King's Advocate and *Laurence* adverted to the circumstances in which the ship was found, sailing directly for the *Tenel*, and under the management of a native *Dutchman*, who had been sent from *Holland* to take possession of the vessel, and contended that it was scarcely credible that a neutral person, having a real interest to support, would expose the management of a ship, acquired under such particular circumstances, to the further suspicion that must arise from the character of the master put on board, and the course which the vessel was pursuing at the time of capture. Doubts of that nature, however, might safely be waived, out of respect for the distinguished person in whose name the claim was given, since it would be sufficient to contend, that he had been drawn, inadvertently, no doubt, into a purchase which could not be sustained in the Prize Court of this country. It was the purchase of an enemy's vessel of war, lying imprisoned in a neutral port,

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port, from whence she was unable to escape. A vessel under these circumstances was not an object fairly within the range of commercial speculation; and if any particular argument was required to shew the noxious consequences that might be likely to result from such a practice, it was abundantly supplied from the course of this transaction, which shewed evidently where such a liberty might be expected to end. The vessel was actually proceeding to the port of her own country, where, with the addition of a few guns, which also might have been brought from *Bergen* by separate opportunities, she might be restored again to her station in the *Dutch* marine as an 18 gun frigate, ready for war. In opposition to these facts, it was not competent to aver the purity and innocence of Count *Bentinck's* intention. They are not impeachable. The vessel so acquired had been entrusted to the management of a *Dutch* master, and it rested with him rather than with the owner, to determine in what manner she would be employed. The conduct of the master had decided the question, because it appeared clearly that he was going, at the time of capture, into the port of *Holland*.

In support of the claim Arnold and Robinson contended—That it was a transaction, which could not be shewn to fall under any principle that had yet led to condemnation in this Court, or the Court of Appeal. The claim had received the sanction of Count *Bentinck*, in person, who was at the present time in this country; and the account which had been furnished of the history of this transaction, would sufficiently obviate the alarm and apprehension of danger that was expressed with regard to the consequences of such a practice. The Court, therefore, would not preclude

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Count *Bentinck* from the opportunity of explaining the circumstances of this transaction.

The facts alluded to, which were allowed to be stated, though not admitted formally in the way of farther proof, were, that the vessel had been long ago disposed of, at the breaking up of the *Dutch East India Company*, to individuals, on whose account she had since continued in the port of *Bergen*. It was from these persons, and not from the Government of *Holland*, or from any public Company, that the purchase was made. The object of that purchase was stated to be for the purpose of employing the vessel in the *West India* trade to *St. Thomas*; as it was known, from other cases, that Count *Bentinck* had applied himself to the encouragement of the navigation of the port of *Kniphausen*, and had, as an example to his subjects, embarked himself in commercial adventures to a considerable extent; that as to the proximity of the vessel, at the time of capture, to the *Dutch* coast, that had happened only from the inexperience of the master, who was an old man, unused to the navigation of a vessel of this built, and who had, on that account, overshot his reckoning; that the master was in reality employed only to bring the vessel from *Bergen* to *Kniphausen*, where another person had been appointed to navigate her in the *West India* trade.

It was prayed that the Court would permit these facts to be regularly substantiated.

JUDGMENT.

Sir *W. Scott*—This question arises on the purchase of a vessel which is asserted to have been made by a highly distinguished person, described to be the Prince of *Kniphausen*. The circumstances of the transaction are these:—It is stated by all the witnesses that

the

the ship had been a vessel of war, belonging to the Government of *Holland*, or to that great branch of the state, the *East India Company*; and it appears that the crew were all hired at *Amsterdam* to go to *Bergen*, and "to bring home an *East India ship*." The account which one of the witnesses gives is very natural on this subject; he says "that he was hired to bring home an *East India ship*, and to his great surprise found that it was a sloop of war, and expressed his apprehensions as to the consequences," as well he might. It is clear also, from other parts of the evidence, that this vessel had been a *Dutch* ship of war that had maintained a conflict with a *British* frigate, and had been driven into *Bergen*, where she had remained sealed up ever since, for nearly three years.

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The first question is, Whether such a purchase can be legally made? I am not aware of any case in this Court, or in the Court of Appeal, in which the legality of such a purchase has been recognized. There have been cases of *merchant vessels* driven into ports out of which they could not escape, and there sold, in which, after much discussion, and some hesitation of opinion, the validity of the purchase has been sustained. Such cases (a), I believe, did

(a) The *Nieuwe Vriendſchap*, *Knuttel* (b), and other *Dutch* ships, that had been lying with their cargoes on board, at *Curacoa*, near two years in expectation of convoy, and were offered to have been sold in that situation to Imperial subjects, and other neutral claimants. (b) Lords, 7th March 1786.

From a note of the *Nieuwe Vriendſchap*, which seems to have been the first of that class of cases, it appears that the point of law was strongly argued. On the part of the claimant some precedents were cited, especially the *Felicity* in 1756, a *French* ship which had sailed from *Martinico*, and had put into *Cadix*, and was there sold, and was afterwards taken and condemned, as not

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did occur during the first war in which I attended this Court, or the Court of Appeal. But whether the purchase of a vessel of this description, *built for war*, and employed as such, and now rendered incapable of acting, as a ship of war, by the arms of the other Belligerent, and driven into a neutral port for shelter—Whether the purchase of such a ship, I say, can be allowed, which shall enable the enemy so far to rescue himself from the disadvantage into which he has fallen, as to have the value at least restored to him by a neutral purchaser, is a question on which I shall wait for the authority of the Superior Court, before I admit the validity of such a transfer. That a private merchant could lawfully do this, I shall not hold, till I am so instructed by the Superior Court. That a Sovereign Prince should embark in such a transaction, unless under such guards as would effectually remove all possibility of abuse, is what, but for the instance before us, could scarcely have been expected. Some communication, at least, we might suppose would be made to the Belligerent Government, accompanied with a disclosure of every circumstance of caution, that should exclude the suspicion of what is always to be apprehended, the danger of such a vessel finding her way back again into the navy of her own country. It has not appeared to my recollection, in any case before the Court, that Count Bentinck was the owner of merchant vessels, or that he was engaged, as we know some Italian princes have been, in mercantile adventures. This perhaps

proved to be *Spanish* property. But that judgment was ~~reversed~~ in the Court of Appeal.

In the *Nieuwe Vriendſchap*, the Court of Appeal seems to have inclined rather to the argument of the claimant, but did not give any decision, upon the question of law, affirming the sentence of condemnation of the Vice-Admiralty Court, *expressly*, on the ground of *dejection* of proof of an actual *bonâ fide* transfer.

is not a material circumstance, further than as it may add a little to the improbability of the present transaction, without much affecting the principle on which I shall determine this case, the illegality of such a purchase. It is the purchase of a ship of war lying in the port of *Bergen*, with eighteen guns and ammunition, of which fourteen guns and the ammunition are taken out for the mere convenience of conveyance. Can such things be allowed to be transferred as articles of commerce, and under the known pressure under which the enemy's marine has laboured? It can, at most, only be expected to be allowed under all circumstances of communicated preventive caution, that might secure the belligerent from the just apprehension of abuse, which I have before stated; some previous acquiescence signified on the part of the belligerent government—some consent obtained, upon an entire disclosure of the intention fully substantiated.

Now what is the course of this transaction? Has any such communication been made? or any such acquiescence signified? nothing appears to either effect. Is there any person sent from the neutral port, whose character in the service of his sovereign might afford any guarantee or protection against abuse? No such thing. On the contrary, the whole contract has been carried on at *Amsterdam*, and the management of the vessel is at last entrusted to an old *Dutchman*, who, though he says he is burgher of *Kniphauzen*, has never set his foot in that place. I can hardly persuade myself that there must not have been some imposition practised in this affair, since I cannot conceive that the *August Person* for whom the claim is given, and who is, no doubt, desirous of preserving, with most perfect honour, his relations of amity with this country, should put a vessel of this description into the hands of such a master as this is, accompanied by a

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crew all picked up at *Amsterdam*. Admitting, as we must, that he was privy to the purchase, we can hardly doubt, at the same time, that those persons who have had the management of this business, have conducted it in a manner very opposite to his inclinations and interests.

Where is the vessel found? The mate says, "within two, or two and a half *Dutch* miles of the *Vlie*;" and the master, who takes the utmost latitude, admits, "within four." In the month of *June*, and in such weather as we have notoriously had during that month, that a man should not find his way into the *Jade*, without getting immediately close to the land of *Holland*, that he should be found in this situation, without having attempted to alter his course, or to retrace his steps, and that he should be continuing to steer on towards the coast of *Holland*, though it is not pretended that he did not know where he was, are such circumstances as convince me that some imposition has been practised. To say precisely what it is, may be presumptuous; though all the circumstances tend to establish a belief that the parties entrusted with the execution of this project, looked to a restitution of this ship into the possession of *Holland*. I cannot doubt that there has been some imposition practised on the *August Person* whose name has been used. If there are any circumstances which can be brought forward on this part to elucidate this transaction, they will be addressed with better effect to the Superior Tribunal, which may be composed of persons better enabled to judge of the conduct of persons in that elevated station than I can consider myself to be. My judgment is, that the transaction of this purchase, taking it to have been made, has been conducted in a manner that cannot be considered as legal.

Claim rejected.

THE NEPTUNUS, BACHMAN, Master.

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THIS was one of an important class of cases of *Swedish* ships, captured on a voyage from the ports of *Sweden* to *Amsterdam* with cargoes of pitch and tar, in which the question turned on the effect of a modified permission of trade with the common enemy, in *innocent articles*, on the part of an ally in the war.

Trade with the enemy on the part of an ally in the war, by permission, of *innocent articles*.—Construction of the term *innocent articles*, &c. *Swedish treaty*, &c.

On the part of the Captors, the King's Advocate and Laurence contended to the effect of the argument in the case of the *Eleonora Wilhelmina* (a), that this was a shipment of articles in their nature contraband; that they could derive no protection from the stipulations of the *Swedish* treaty, which were made with reference only to the situation of one party being neutral; whereas *Sweden* has been in conjunction with this country in hostilities against *France* and her allies; that an Order of Council had issued for the permission of trade of *Swedish* subjects, in innocent articles, which must be the rule for the Court, and cannot be considered to extend to articles of this nature; that this shipment being stripped of all protection, either from the treaty, or the recent Order of Council, must fall back into its natural contraband character, being a shipment of naval stores going to a port of military equipment.

(a) *Supra*, p. 332.

On the part of the Claimant, Arno'd and Robinson contended—That the correspondence which had passed between the Secretary of State and the *Swedish* Minister

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ter went farther, to shew the view in which these articles were considered as *innocent*, and permitted as such, by the Government of *Sweden*; that they would in that character be entitled to the protection of the treaty, as a trade excepted from hostility by the special permission of the *Swedish* Government. That if the treaty was put out of the question, the character of articles of this description, being the produce of *Sweden*, would revert to the state in which it had long stood, previous to the treaty, as a *vexata questio* between the two countries. That if *we* adhered to the interpretation of considering them as contraband, in the *hands* of *neutral* merchants, the case of an allied enemy presents a favourable, rather than an unfavourable distinction, inasmuch as it must stand clear of suspicion as to the intention with which the trade was carried on. In respect to *neutral* merchants, the penalty of contraband is applied with strictness to counteract the wilful adhering to the enemy, which may be imputable to their motives. In the case of an allied enemy, there is the strongest guarantee for the design with which such a trade is permitted. It is, therefore, to be considered rather as a misunderstanding in the mode of conducting the joint operations of the war, which is to be corrected by amicable expostulation, and not by a recourse to rules framed for the correction of abuses, in the conduct of parties in a situation totally different.

JUDGMENT.

Sir *William Scott*.—This is the case of a ship, and cargo of pitch and tar, going from *Gottenburgh* to *Amsterdam*, on which several questions arise, first ^{as}

to the liberty of carrying such cargoes under the present situation of this country and *Sweden*; and secondly, whether there is any thing of a special nature to vary the general rule which would be otherwise applicable to the case. The right of carrying pitch and tar has long been a subject of much contention, this country contending that they were to be considered as contraband, *Sweden*, on the contrary, maintaining, that they were not contraband when they were the produce of the exporting country. After long and passionate discussion on this subject, which has irritated the feelings of the two countries for two centuries, a sort of compromise was at length adopted, and the late treaty was formed as a kind of middle term, in which both parties abated something of their original pretensions. It was agreed that these articles should be considered not as absolutely contraband, nor yet as entirely free and innocent, but as liable to this exercise of the right of war, "that they should be subject to seizure for *pre-emption*." This was the substance of the treaty that was formed for the regulation of the trade of *Sweden*, when that country was at peace, and in a state of neutrality towards each of the belligerent powers.

That, however, is not the present situation of the two countries, since *Sweden* has long been engaged with this country in hostility against a common enemy. The question, therefore, is to be taken up on different grounds, as depending on the general principles belonging to such a state of warlike confederacy, on what has passed between the two courts immediately applicable to this subject, and on the public orders which have issued for the regulation of trade. It is well known that a declaration of hostility naturally carries with it an interdiction of all commercial intercourse;

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it leaves the belligerent countries in a state that is inconsistent with the relations of commerce. This is the natural result of a state of war, and it is by no means necessary that there should be a special interdiction of commerce to produce this effect. At the same time it has happened, since the world has grown more commercial, that a practice has crept in of admitting particular relaxations; and if one state only is at war, no injury is committed to any other state. It is of no importance to other nations, how much a single *Belligerent* chooses to weaken and dilute his own rights. But it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express contract, that one state shall not do any thing to defeat the general object. If one state admits its subjects to carry on an uninterrupted trade with the enemy, the consequence may be that it will supply that aid and *comfort* to the enemy, especially if it is an enemy depending, like *Holland*, very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause, and the interests of its Ally. It should seem, that it is not enough, therefore, to say that the *one* state has allowed this practice to its own subjects; it should appear to be at least desirable that it could be shewn, that either the practice is of such a nature, as can in no manner interfere with the common operations, or that it has the allowance of the confederate state.

If *Sweden* and *Holland* are at war, there is no occasion for a special prohibition, as is intimated in Mr. *Alderberg's* letter. But if it is taken on the evidence of the correspondence, that the *Swedish* government has given an express liberty to its subjects to freight vessels

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vessels for the ports of *Holland*, this must necessarily admit of some limitations; for can it be maintained, under the latitude of that expression, that they might carry gunpowder, or any other article in a state of preparation for the purposes of war? It is not enough to say, that it is the natural produce of the country, because that principle must have its limits in acknowledged principles of self-defence on the part of the allied belligerent. Suppose the case of a country so unfortunately framed by nature as to produce nothing but sulphur, wood, and nitre, or that iron was the only production, can it be said that the inhabitants of that country should be at liberty to export their own manufacture of gunpowder or *cannon* to the ports of the enemy? There must be some limitation assigned to pretensions of this kind. Where are they to be found? In the order that has been issued by our own government (a), reciting "that information had been received that *Sweden* allows a trade in innocent articles only," and confirming the liberty of trade to that extent. It appears from Mr. *Canning's* letter, that some discussion had taken place on this subject between the Secretary of State and the *Swedisch* Minister, in which a confident persuasion is expressed on the part of this Government, that *Sweden* could not mean to suffer a supply of *naval stores* to be carried to the ports of the enemy. That being the construction which this Government has put upon the permission, it must be binding on this Court. Permission is understood to be granted for innocent articles, but with an exclusion of *naval stores*. Then waiving the question of contraband, it is sufficient to ask, whether the articles, of which this cargo is composed, fall under
the

(a) July 31,
1807.

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*l.g. 12 and 14,
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the description of naval stores? and that is a question which answers itself.

It is said that the terms of the letter seem to reserve the consideration of naval stores for further discussion, and the Court is requested to suspend its judgment till that discussion has taken place. But it is not to be inferred from the request made for additional security, on the part of this country, that we should suspend our own declaration on the subject, which is expressed in definite terms. Nothing is reserved as to the question, whether pitch and tar are to be considered as innocent articles or not. That is expressly determined by the restriction of naval and military stores; regarding which it cannot admit of a doubt that these articles are to be included under that description. I am of opinion, that, where such articles occur, though the word *contraband* may be kept out of sight, the Court is bound to consider them *as of the nature of contraband*, in such a sense, as renders it impossible that they could be included under the description of innocent articles.

This is the general principle that I feel myself bound to apply to the whole class. And in no instance can the penalty of confiscation be applied with more propriety, than in this first case which occurs, in which the parties exporting these articles to the enemy, are *British* subjects, domiciled in *Sweden*. It has been decided both in this Court and in the Court of Appeal, that though a *British* subject, resident abroad, may engage generally in trade with the enemy, he cannot carry on such a trade in articles of a *contraband* nature. The duties of allegiance ~~travel~~
with

with them, so as to restrain them from supplying articles of that kind to the enemy. This, however, I only mention as an aggravation of this particular case. On the general question I have no hesitation in pronouncing that the pitch and tar will be subject to condemnation.

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But it is contended that the innocent parts of the cargo also, and the ship herself, will be subject to condemnation, on the known principle, that the infection of contraband extends also to all interests included in the same claim, on behalf of the same proprietor. I could assent to that argument if the case stood only on the general law; but when I look to the order of Government, I find "*that all other goods are directed to be restored.*" So with regard to the ship: It has been uniformly held on general principles, that the vessel belonging to the proprietor of contraband goods is liable to confiscation. But the order itself, in directing the restitution of *all other goods*, implies that this class of cases is not to be decided, strictly, on the *general* principle of contraband. *Swedish* vessels have been allowed to go to the ports of the enemy with permitted goods, and this country has acquiesced in that indulgence. I shall not, therefore, apply the principles of contraband to the ship, under this modified state of the general rule.

There is one parcel of goods, I perceive, in which the bill of lading has been endorsed over to the consignee in *Holland*, and the master, in his deposition, says, "that he believes they would have become the property of the consignee on arrival." This, I conceive, is such a transfer of the property, as will render those particular goods liable to confiscation. The innocent goods, it appears, were going under a special licence granted by the King of *Holland*

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Holland to Anderfen and Co. at Amsterdam, to import a certain number of cargoes in *Swedish* ships. This has so much the appearance of a special *indulto*, that it may not be without its consequence in determining on the national character of a trade so carried on, even on the part of *Swedish* subjects. If it is pressed, I shall require some explanation to be given of the nature of these licences, and of the manner in which they are obtained and applied.

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THE SANSOM; STEVENS, Master.

Salvage on re-capture of neutral property, from the effect of the decree of 21 Nov. 1806, given.

THIS was a case of an *American* ship that had been captured on the 25th of *June* 1847, on a voyage from *Amsterdam* to *Falmouth*, by a *Spanish* privateer, under the decree of the 21st *November*, 1806, against *British* commerce, and had, on the 3d of *June* following, been re-captured afterwards, and brought to *England*.

On the part of the Re-captors, the King's Advocate and Robinson contended—That, on the same principle on which the Court had decreed salvage in some late *Danish* cases (a), on re-capture from *French* seizure,

(b) *June* 11.

(c) *May* 13,
1807.

(a) The *Familien* and the *Emanuel* (b), *Danish* vessels from *Denmark*, to *England*.—Also the *Alert* (c), *English* ship, from *Magadore* to *London*. Cargo claimed for merchants at *Magadore*, and restored on salvage.—In the *Danish* cases, a certificate from the Chamber of Commerce at *Copenhagen*, dated 11th *June* 1807, was introduced, stating “that official intelligence had been received, that up to the 19th of *December* last, no alteration had been made

seizure, it would also give salvage on re-capture from *Spanish* cruisers. That nation had acted in concert with, or rather in obedience, to *France*, in their attempts to enforce the decree of the 21st *November*. It appeared, also, from a paper on board, in the nature of a *proces verbal* of what passed at the time of capture, that the captain of the *Spanish* privateer alleged this particular ground of capture, and asked the *American* captain if he did not know that *England* was under blockade.

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On the other side, *Laurence and Jenner*, argued on the general principle, that salvage on neutral property was not given, unless on very special grounds. That in the former case, it had been almost admitted, that *American* cases would form an exception to other cases of recapture under the decree of the 21st *November*, since it was understood, that there had been a treaty, or specific assurance given by *France*, that *American* vessels should not be molested in their course to *England*; that this was so generally credited, as to have been made the basis of much negotiation in the settlement of our commercial differences with *America*.

In reply it was said—That what had passed relative to *American* cases, was merely hypothetical, and for the purpose of shewing that if such an exemption did exist, it was very distinguishable from the privilege claimed for *Danish* vessels, on the mere assertion of the certificate that was then introduced. It was,

in the *French* decrees previously issued respecting captures, and that therefore neither the *French* privateers nor ships of war had, up to the above mentioned date, been authorized to seize at sea, and carry into *French* ports neutral ships sailing from or to *English* ports."

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in those cases expressly intimated by the Court, that if such a privilege was claimed under treaty or agreement, the treaty would be expected to be produced, that it might appear to what extent, and under what conditions, such an exception to the general operation of the decree had been conceded.

At the conclusion of the argument *Laurence* prayed — That the case might stand over till enquiry could be made of the *American* Minister. On a subsequent day, a letter (a) was introduced from the Minister of Marine to General *Armstrong*, the *American* ambassador at *Paris*. The effect of this communication was further argued.

(a) 17 Aug.
See Appendix,
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18th Augst.

JUDGMENT.

Sir William Scott.—This question arises on the recapture of an *American* ship and cargo, destined originally to *Falmouth*, and retaken out of the hands of a *Spanish* privateer, which had made the capture on the grounds of their liability to condemnation for trading to this country. I have looked over the letter of the master of the privateer, which seems to have been written with a view of giving a representation of his proceedings to his owners. As far as I can collect of this person's character from that letter, he appears to be a man rather of superior education in his class of life; and it is perfectly clear that, in the mind of this person, on their arrival in *Spain*, nothing more would be necessary than the mere formality of a legal proceeding, to obtain condemnation as prize to the captors. It appears also by a *proces verbal*, which was drawn up, reciting the particulars of the seizure, that the question was put to the *American* master, "whether he knew of the decree of the blockade of *England*?" to which he answered that he did; and it is then

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then added, "agreeable to the declaration of our sovereign," the *Spanish* Captor took possession of the prize."

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This vessel has been re-captured, and the question before me is, whether the re-captors are entitled to any salvage. It is unnecessary to repeat that the general practice of this Court is not to decree salvage on neutral ships re-captured, upon the presumption that no peril had been incurred, but that, on being carried into the Courts of the original captor, they would have been restored. This is a presumption which is to be entertained in favour of every state, which has not sullied its character by a gross violation of the law of nations. But the contrary presumption takes place if states hold out decrees of condemnation, however unjust, and decrees on which the tribunals of the country are enjoined to act, and of which there is every reason to suppose, that they will be carried into execution. The reasoning on which the general rule had been founded is then done away; the peril is obvious, and the case becomes simply that of meritorious rescue from the danger of condemnation.

Of this nature was the decree of the *French* Government, which was issued on the 21st of *November*, to the no small surprize of this nation, and of all *European* states. The protocol recites the grievances, the commission of which is imputed to this country; and declares, "that every person or country that carries on commerce with *England*, and thereby favours her trade, becomes an accomplice." It seems quite extravagant to say, that this was intended only to prohibit the direct trade between *England* and *France*. It is likewise inconsistent with the terms of the declaration to suppose that it was meant to be restricted to the continent of *Europe* only. The manner in which the word *continent* is used, shews that it was

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intended to apply to neutrals of all descriptions, and of all countries. The *Protocol* then declares "that *France* has resolved to direct against *England* the same regulations which *England* has established; and that the following decree shall be taken as a fundamental law of the empire." Language cannot convey a more solemn denunciation; and it is what *France* is pledged to act upon, "till *England* shall be convinced that the rights of war are the same on land as on sea; that it does not extend to private property; and that the law of blockade is to be applied only to places actually invested." Till this pretended reformation takes place, these regulations are to be considered as the fundamental law of the empire. And what is the first of these regulations?—"that the *British Isles* shall be placed in a state of blockade."

Connecting this with what goes before, and with what follows, "that all trade and all correspondence with the *British Isles* is prohibited," is it possible to maintain seriously that nothing more is meant than the prohibition of trade between *England* and *France*? Whoever heard of *such a blockade*, or of such a prohibition being so described, or denominated? Such a prohibition as that is no more than the common effect of war; for it is not the practice of countries that are at war, to permit even neutral ships to clear out for the ports of each other. The intercourse is carried on in a dissembled manner by clearances that purport the destination to be to other countries. If we consider also that it is expressly opposed to *British blockade*, and that the menace is to retaliate the "*same restraint*," it is perfectly clear that the only intelligible meaning is that which the *Spanish privateers* put upon it, and which every man of reflection must put upon it, that it was meant to impose a general blockade, properly so called. That the enemy will act

act upon this declaration cannot be doubted, as well from the solemnity with which it is denounced, as from the purpose avowed, and the precise manner in which it is drawn up.

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In arguing the *Danish* cases, it was contended that the decree of the 21st of *November* was not designed to be enforced against the *Danes*; and when you retake an *American*, it is said, that it is not meant to operate against *Americans*. Nothing surely can be more sweeping than the general clause, which the *French* Government pledges itself to enforce against the commerce of the *British* ports, till a particular object is obtained. It is said that no particular instructions have been given to privateers. None are necessary. The decree itself is the strongest instruction that could be given. It is declared to be imperative on the Tribunals of *France*, and that is sufficient. What the exact terms of the *Spanish* decree are, we are not informed; but they are, we may suppose, co-extensive with the former, and framed on the same principles, and with the design of producing the same effect. There can be as little doubt that it is to be acted upon. The captain of the *Spanish* cruiser seems to have entertained no doubt as to that consequence, but declares, and I think very reasonably, his conviction, that he should obtain immediate condemnation, and upon these precise grounds.

It is impossible to deny, then, that a service has, *prima facie*, been rendered to this property, by rescuing it from the operation of an intention so publicly and solemnly announced? But in the *Danish* cases it was said that it was not so; and the certificate of the College of Commerce in *Denmark* was exhibited, asserting "that the decree had no operation against *Danish* ships, and that the College of Commerce had received positive intelligence that the *French* cruisers had,

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up to the 19th Dec. received no instructions, pursuant to the decree of the 21st of November, to capture *Danish* ships bound to *British* ports." It was answered at that time, that the decree itself is a sufficient instruction, and that no other was necessary; and the objection was over-ruled. Here more papers are introduced, and before I observe upon them, I may premise, that to alter the view which the Court has already taken of this question, they must contain evidence of one of these two descriptions. Either that there has been some special exemption in favour of *American* vessels, or that some more correct information has been obtained of a general nature, which was not produced in the *Danish* cases, but which, if produced, would have protected those cases also.

That there is any thing of a special nature, in the form of a treaty upon this subject, controuling the execution of the decree in favour of *America*, is not asserted. If there was any such, it might become a *grave* question, how far this country could be expected to follow the capricious and fanciful modifications of this violent decree? I am not prepared to say *hastily* what would be the result of an enquiry, respecting such a partial exception, if it was shewn to exist, on the authority even of a treaty, or public declaration. It is easy to see what its effects might be on this country. Out of a general menace against the commerce of this country, special boons and favours might be carved, to be distributed to other countries at its expence, and for which perhaps the enemy might have contracted for some further benefit, in the attainment of some other object of his enmity towards *Great Britain*. It might be the only means of carrying such a measure into any effect, by disarming the opposition of the more powerful neutral States in consequence of these favourable

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favourable exemptions. This is a consequence, as every one must see, that is not to be rashly conceded, nor without great deliberation, by a Tribunal which has to judge fairly, and impartially, on the rights of neutrals, and on the rights of the Belligerent, under whose authority it immediately sits.

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SANCTION.

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The papers which have been brought in contain something of a communication from the Minister of the *French Marine* (a) to the *American Minister in France*, in answer to some questions proposed by him. It would have been a satisfaction to the Court to have seen those questions, but I am informed that they cannot be produced, as Mr. *Munroe* is not in possession of them.

This Court is, I trust, on no occasion disposed to violate the respect due to the productions of public ministers of any country. But of this letter I must say, that it is as flimsy a piece of *French* manufacture as ever was produced. It is stamped with sophistry in every part; and it appears to have proceeded from a person who doubted his own authority to enter into any explanation on the subject. It comes from the Minister of the Marine, who, I conceive, is an officer corresponding in general respects with the persons in the executive Admiralty department of this country. He himself, in one place, declares that it is a question which should properly be referred to the Minister of Foreign Relations. It is in its terms not more than an *opinion* "*je pense*," not in the form of a public authoritative declaration, and it disavows all pretensions to any such character.

As to the substance, let us see how correctly this gentleman's *opinions*, such as they are, are formed. He says, "I am not aware that the decree has altered the law as to the trade of neutral nations." What reverence is to

(a) The letter is inserted in the Appendix, No. I.

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be paid to such an opinion as this? That no modification or restriction of trade whatever was introduced by this decree! That a person, who had ever heard of this decree, could hazard such an assertion to the consideration of a grave and intelligent man, in the situation of the gentleman to whom it was addressed, argues little but an extraordinary courage in the writer of the letter which contains it.

The second position advanced is, "that the decree does not authorize any *condemnation* to the captors." What alteration does that make, or what ground of alleviation or comfort is it to the neutral merchant, whether his property is condemned to the captor or to the state? A reference is then made to that article of the decree which directs that foreign ships, coming from *English* ports, should not be permitted to enter the ports of *France*; and this is asserted to be inconsistent with the notion that they would be subject to condemnation. To this I can only say, that whether it is *consistent* or *inconsistent* would perhaps not be very material in the execution of that decree. It might be meant only as an additional protection to the enforcement of the decree, in the case of ships coming under ignorance of the decree. That is the only interpretation that can be given to it, that renders it at all consistent with the other articles of the decree, and therefore is the interpretation which, by all reasonable rules of construction, ought to be applied to it. Perhaps it is a convenient clause, to be used, or not used, at pleasure. The letter concludes with an intimation "that General *Armstrong* should apply to the Minister of Foreign Relations," which is in fact the only intelligible part of the whole letter. It is quite impossible that the Court can pay any attention to such an *opinion*, which is in direct repugnance to the text on which it comments, and which professes to carry no authority with it.

it. There are two or three other papers on which some observations have been made. The first is the letter of General *Armstrong* to Mr. *Munroe*, in which he says, that his understanding of the effect of the decree is not well founded; that there were only two or three cases known to him, in which restitution had been obtained on his application. But no particulars are stated; whether they were cases under this decree or not does not appear. With all the respect that I feel for the declarations of the minister of a foreign government, I cannot take this intimation of some cases that had occurred, as a proof of a general practical deviation from the letter of this decree. The *French* Government has at all times been in the habit of making occasional deviations from the general rules of their Prize Code, though these general rules compose their standing law. Another paper which has been introduced this morning, is an affidavit of a gentleman reciting the case of a vessel which had been captured and carried into *Spain*, where the Judge of the Prize Court is reported to have said, that "*he could not see any ground of seizure.*" I think That gentleman must have laboured under a very considerable infirmity of sight, having this decree before him, if indeed he could in reality be blind to the effect of it. When the whole is shewn, what is there which the Court can admit as distinguishing this case from the *Danish* cases, which have been already determined? With every disposition to protect persons, as much as possible, from suffering from the consequences of *French* violence, I can see nothing. The decree is general, announced in the most solemn manner, and in terms imperative upon all Ministers and Courts of Justice in *France*. It must be taken to be that on which That government means to act, for such is the interpretation to be put upon every public declaration of a State, as to its future intended conduct,

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conduct, even if announced with much less striking appearances of fixed determination. It would be strange indeed if the *French* Government could be allowed to take the benefit of such captures, and then, in cases of recapture, to encourage the neutral claimant to come here and say, that no such thing was meant by the decree. I am of opinion that this case stands, without any thing that can enable me to distinguish it from the other cases already decided, and that I am bound to pronounce salvage to be due.

Aug. 19th,
1807.

Unneutral conduct—ship engaged as a transport in the military service of the enemy—condemned.

THE FRIENDSHIP, COLLARD, Master.

THIS was a case of an *American* ship bound on a voyage from *Baltimore* and *Annapolis* to *Bourdeaux*, with 30 tons of fustic, and 4414 hogsheads staves, and 90 passengers, being *French* mariners, shipped under the direction of the *French* Minister in *America*. The ship was claimed for a Mr. *Guestier* a *Frenchman* by birth, but a subject of the United States.

On the part of the Captors, *Arnold* and *Robinson* contended — That this was the case of a vessel let out for the purpose of being made the vehicle of transporting persons in the military service of the enemy, under the interference and direction of the public officer of the *French* Government. That it was therefore to be considered as liable to condemnation, in the character of an enemy's transport, agreeable to what had been before laid down by the Court, in the case of the *Caroline*, *Nordquist*, 4 Adm. Rep. p. 256 (a).

On

(a) The act of carrying the *soldiers* of the enemy has been in former wars *assimilated* to contraband, by public proclamation and instructions, and has been declared to render the ship liable to condemnation.

On the part of the Claimant, Laurence and Swabey contended—That it did not, in its circumstances, amount to a case of that description; that the opinion which fell from the Court in the *Caroline*, was no more than a *dictum* on some extrinsic circumstances, which had been brought into discussion, but upon which the case did not depend. That the facts of that case were besides much stronger than the present. That was the case of a vessel fitted out to carry a troop of cavalry of the enemy, and to form a part of a great military expedition. No case had been mentioned in which a sentence of condemnation had passed on facts similar to the present. On the contrary, there had been a case before the Lords, in which some *French* soldiers appeared to have been going on their passage to *Philadelphia*, but in that case no penalty was held to attach on the vessel on that account. There was nothing in the particular manner in which this vessel was chartered, that denoted her to be of the character of a transport. She was going for purposes of commerce, and with these persons on board as passengers, some of whom were described as invalids. It did not appear that they were

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demnation. The declaration of war, 25th *March*, 1744, concludes with the following clause:

“ And we do hereby command our own subjects, and advertize all other persons of what nation soever, not to transport or carry any *soldiers*, arms, powder, ammunition, or other contraband goods, to any of their territories, lands, plantations, or countries of the said *French* king, declaring, that whatsoever ship or vessel shall be met withal transporting or carrying any *soldiers*, arms, powder, ammunition, or other contraband goods, to any of the territories, lands, plantations, or countries of the said *French* king, the same being taken shall be condemned as good and lawful prize.”

The same declaration is also inserted in the second article of the instruction to cruizers of the same date; also in the second article of the instructions in the war with *Spain*, 20th *Dec.* 1718.

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associated together as the crew of any particular vessel; or that they were going to be continued in their military character, much less in any military expedition against their Country; they were merely individuals returning to their own country, where they would be less formidable than in foreign service.

In reply it was said, that no precise circumstances were necessary to constitute the transport character; that the main circumstance must always be, whether the vessel was let out for the military purposes of the enemy; if that fact appeared, it was immaterial whether the voyage was *out* or *home*, since the main consideration would be, that they were going at the disposal of the enemy, to the place to which it was most convenient to the purposes of the enemy that they should be conveyed.

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JUDGMENT.

Sir *William Scott*.—This is an *American* ship with a few goods of small bulk and little value, about 30 tons of fustic, and some staves, which are frequently taken as dunnage, or ballast, but very seldom as a principal cargo. But there is a cargo on board of a different kind, ninety passengers, one *American*, five *French* merchants, and the rest *French* military officers and mariners. It has been objected that the seventh Interrogatory must have been improperly addressed to the witnesses, since it has extracted an answer from the master, which could not have been suggested by the interrogatory, addressed in its usual and proper form. The master says, “*That the vessel was not a French transport*; that there were about ninety passengers on board, but who paid for their passage he does not know; that the provisions were supplied by the owner of the

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ship." These are facts which do not naturally arise out of the interrogatory, and so far the question must have been irregular. But the answer is not of a nature that raises any imputation of improper deviation from duty on the part of the Commissioners; because, if the question had not been put to the witnesses by them, it is one which I should certainly have thought it necessary to address to them. How persons, appearing like those on board, in a military character, were taken on board as passengers,—How their provisions were supplied, are questions of fact very proper to be answered. Notwithstanding there may have been some little irregularity in the form, in which the interrogatories have been put, with reference to which the answer has been given, *that the ship was not a French transport*, it will not be necessary to delay the cause, for the purpose of having them put again, under the authority of the Court. That is a point which the Court has to determine, on a view of all the evidence, and which cannot be taken either way merely on the master's representation. The master knows little, and with respect to what he has to disclose, the Court may very safely proceed on his deposition in the present form.

The instructions of the owner are produced, directing the master "to go to *Annapolis*, there to take as many passengers as you can;" as if they were to be picked up accidentally, and without previous contract. They then go on in these terms: "*You must go to Bourdeaux*, and deliver the fustic; you will endeavour to preserve a good understanding between the passengers and the crew, and see that they have their due allowance, according to the instructions which will be communicated to you." "In case of *British* capture (an event which seems very reasonably to have

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have been apprehended), or being carried into a *British* port, you will apply to," &c. It is evident from these papers, and from other circumstances, that there must have been a formal contract between the owner and the person, who was to pay the passage-money for these mariners; No such instrument is produced, and on enquiring for it, I am told that it is not in this country. I am therefore left in the dark, as to the terms of the contracting parties, and I am to determine from other parts of the case what the character of this vessel is, whether she is to be considered as a neutral vessel carrying on an innoxious commerce, or as a transport vessel engaged in the immediate military service of the enemy.

In order to determine how far the vessel was engaged in a commercial employment, I have little more to do than to look at the nature of this part, or *parcel of the cargo*, which she carries, for so it is called by the mate, and also by the master. So little however do the *French* officers know of the lading, that they depose, "*that there was no cargo on board,*" and repeat "*that there was not any lading*" over and over again. I observe this also more particularly with respect to the deposition of one person, *M. Septans*, who was more immediately concerned in the transaction, being a sort of superintendant over the rest. He says in three distinct places, "*that there was no cargo on board.*" I am rather led by this manner of deposing to conjecture, that it would be found to be one of the conditions of the contract (if it could be inspected) *that there should not be any cargo taken on board*, but that the whole space should be reserved for the accommodation of the passengers; and that these witnesses speak correctly under the impression
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of their understanding of the contract, "*that no cargo was on board.*"

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On this evidence I may, I think, dispose of that part of the case which depends upon character, and may determine, that the vessel has no commercial character belonging to her, that can be said to arise out of the nature of her lading. As far as it is contended that the ship cannot be considered as a transport, because she had a cargo on board, I am of opinion that all such argument is effectually answered, and that there was, in the understanding of the parties, no cargo on board; as indeed it is a common stipulation with transports, that none shall be taken. It is said that there is nothing in the form of a charter-party, to denote the vessel to have been a transport, under contract with the enemy's government. I know of no precise technical definition of transport vessels, more than this, that they are vessels hired by the government to do such acts as shall be imposed upon them, in the military service of the country. In this country there is a particular department of office called the Transport Board, and the vessels which are hired by that Board are distinguished in common language by the name of Transport Vessels. Other nations may have different modes of conducting this service, and it is by no means essential to the character of a transport, that she should be chartered in any particular manner, or in any particular form of words, or by any particular department of the Government. In contracts made abroad, more especially, where the same opportunities may not occur, it would be still less to be expected that they should be confined to particular forms. If *French* vessels are not to be found, others must be employed on their own terms.

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The form, therefore, is of no importance. The substance of the thing is this, whether they are vessels hired by the agents of the Government, for the purpose of conveying soldiers or stores in the service of the state? That is the substance; and it signifies nothing whether the men so conveyed are to be put into action on an immediate expedition or not. The mere shifting of draughts in detachments, and the conveyance of stores from one place to another, is an ordinary employment of transport vessels, and it is a distinction totally unimportant, whether this or that case may be connected with the *immediate active service* of the enemy. In removing forces from distant settlements, there may be no intention of immediate action: but still the general importance of having troops conveyed to places, where it is convenient that they should be collected, either for present, or future use, is what constitutes the object and employment of transport vessels. I therefore, discard that distinction, that these persons were not going on an immediate active expedition.

Then, what are the circumstances that disclose themselves in this case? If the contract is not on board, but is industriously concealed from the master, who professes to know nothing about it, or if he wilfully suppresses the fact, though it is in his knowledge, that will not defeat the Courts of the Belligerent of their right of putting the proper construction on the act done. This then appears, that it was a transaction entered into with the privity and consent of the *French* Government. It was done under the authority of what the *French* call their Public Functionary, their Minister Plenipotentiary in *America*. There is
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an order from the Representative of the French Government, dated May 31, "directing an officer, by the name of *Aubrey*, in virtue of the disposition of the Minister Plenipotentiary resident in the United States, to disembark from the *Eole*, and to go on board the American ship the *Union*, destined immediately to France." There is also another paper from the Commissary of Marine at *St. Domingo*, which grants "permission to Mr. *Septans*, late *accountable Agent* to the French ship the *Felicite*, to return to France in a neutral vessel, on condition that he should present himself to the constituted authority of the port at which he should land." So in the public papers, the other persons also are required "to render themselves at the port of their arrival in France to the *Bureau Maritime*, there to receive further orders." There cannot be stronger evidence than this, that these persons are still retained in the public service. Then comes the certificate of the French consul at *Maryland*, which orders Mr. *Septans* to go on board as *accountable agent* in this ship, to "*preserve the police*," which is a strong term, and may be supposed to include something of military discipline, "and to act with the senior officers among the passengers," manifestly keeping up a military subordination, "according to instructions which he would receive." No such instructions are produced; but it is clear that some must have been delivered, which are now withheld. Then comes the muster-roll, which describes these passengers in their several capacities, as military and naval officers, and mariners of all classes, being the relics of the crews of two vessels going back to France, still preserving their professional character and situation, as part of the marine of France, subject to the orders

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orders of the marine department on their arrival, and going at the expence of the *French* Government. Is it not ludicrous then to speak of the cargo of this vessel, as being any other than these passengers for whom the ship was freighted? I have no doubt that, if the charter-party was produced, which is now skulking in obscurity, it would appear to be a fundamental condition of that contract, that no cargo should be taken on board.

Under these circumstances, I am of opinion that this vessel is to be considered as a *French* transport. It would be a very different case if a vessel appeared to be carrying only a few individual *invalided* foldiers, or discharged sailors, taken on board by chance, and at their own charge. Looking at the description given of the men on board, I am satisfied that they are still as effective members of the *French* marine as any can be. Shall it be said then that this is an innoxious trade, or that it is an innocent occupation of the vessel? What are arms and ammunition in comparison with men, who may be going to be conveyed, perhaps, to renew their activity on our own shores? They are persons in a military capacity, who could not have made their escape in a vessel of their own country. Can it be allowed that neutral vessels shall be at liberty to step in and make themselves a vehicle for the liberation of such persons, whom the chance of war has made, in some measure, prisoners in a distant port of their own colonies in the *West Indies*? It is asked, will you lay down a principle that may be carried to the length of preventing a military officer, in the service of the enemy, from finding his way home in a neutral vessel from *Ame-*

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rica to Europe? If he was going merely as an ordinary passenger, as other passengers do, and at his own expence, the question would present itself in a very different form. Neither this Court, nor any other *British* Tribunal has ever laid down the principle to that extent. This is a case differently composed. It is the case of a vessel letting herself out in a distinct manner, under a contract with the enemy's government, to convey a number of persons, described as being in the service of the enemy, with their military character travelling with them, and to restore them to their own country in that character. I do with perfect satisfaction of mind, pronounce this to be a case of a ship engaged in a course of trade, which cannot be considered to be permitted to neutral vessels, and without hesitation pronounce this vessel subject to condemnation—The fustic and slaves were condemned also,

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On Prayer, that The Master's Adventure might be restored—The Court said, "I shall leave him to the mercy of the captors. He is a man who has not made an ingenuous disclosure of the facts in his possession."

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1807.

THE OROZEMBO, BREWSTER, Master,

Similar point.
Neutral ship,
chartered to
carry out officers
in the military
service of the
enemy.—Num-
ber immaterial,
&c.—condemn-
ed.

THIS was a case, of a description similar to the last, of an *American* vessel that had been ostensibly chartered by a merchant at *Lisbon*, "to proceed in ballast to *Ma-cao*, and there to take a cargo to *America*," but which had been afterwards, by his directions, fitted up for the reception of three military officers of distinction, and two persons in civil departments in the government of *Batavia*, who had come from *Holland* to take their passage to *Batavia*, under the appointment of the Government of *Holland*. There were also on board a lady, and some persons in the capacity of servants, making in the whole seventeen passengers.

On the part of the Captors, the King's Advocate and Arnold—argued on the facts disclosed in evidence, that this vessel was to be considered as a transport in the service of the enemy; that she was chartered unquestionably for the purpose of carrying out three military officers to the settlement of *Batavia*, under the special appointment of the *Dutch* Government, who had sent these persons from their former situations to *Lisbon*, with assurances that they would there find a vessel chartered to carry them to *China*; or rather, as it must be supposed, *immediately to Batavia*, since the principal officer, who had been examined, admitted that he should have compelled the master to proceed to that place. It was a case, therefore, that came

under the authority of the *Caroline*, and the *Friendship*. In principle it was precisely a parallel case. It was an engagement to become the vehicle of conveying persons in the military service of the enemy, to the settlement of the enemy, and at the disposition of the enemy's government. Under this description, it would be immaterial whether the master was conscious of the fact or not, because he was not at liberty to aver his ignorance, so as to discharge himself or his vessel, from the consequences of an illegal transaction. If any fraud had been committed against him or his owner, the freighter was answerable to them; it was, however, scarcely credible that the master could be ignorant either of the nature of his engagement, or of its illegal character, because there was reason to suppose that the instructions and charter-party, which were put on board to give the voyage an appearance of a mercantile transaction, were merely colourable, and fabricated for that purpose.

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On the part of the Claimant, Laurence and Robinson argued on the result of the evidence, that there was nothing to affect the master with a privity in this transaction. That the evidence of the *Dutch* officer, who seemed to have fairly disclosed the whole truth, acquitted him of any knowledge of the destination, on which they were intending to proceed. It was not a case, therefore, in which the Court could hold the owner, of the vessel, responsible for the engagements of any person, who could be considered as the agent of the owner. If the contract should be held illegal, under the construc-

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tion which this Court, having a view of all the circumstances of the case, might be disposed to put upon it, it was merely the act of the *Portuguese* freighter, which could not by legal consequence affect the property of another person not privy to the transaction. It was besides an act so far at least doubtful in its nature, that it was not referable to any class of cases in which the opinion of the Courts of this Country had been distinctly declared. As to the rule borrowed from the law of contraband, that the master could not plead his ignorance, it must be acknowledged that the two cases stood on very different grounds. The rule of contraband was of ancient standing, and familiar to the minds of all men. It was besides founded on the general probability, that the master would be acquainted with the quality of his cargo. But with respect to the secret destination, and intention of particular persons on board, in the character of passengers, it was impossible that he could *conjecture*, much less *know*, the purposes for which they were going, beyond what they might think proper to disclose. The destination, in the present case, was from one neutral port to another, and to *one*, from which the opportunities of reaching *Batavia* were so frequent and easy, that there was no reason to infer, from the intention of the persons themselves to proceed thither, that the master was apprized of their intention, much less that he had made himself in any manner instrumental to their immediate conveyance. In the late case of the *Friendship*, the Court was anxious to guard the principle then in discussion from the danger of being applied to ambiguous cases. The transaction in that case was founded on the act of the owner himself, and

and was clearly of a military character. The contract was made with the ostensible agents of the *French* Government. The number of persons carried was considerable, and in the known and obvious character of military persons, going directly to the enemy's country. This was a transaction of a commercial nature in its principal features. The military persons were few in number, not taken on board in their military character, and destined, on this immediate voyage, to a neutral country.

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In reply it was contended—That the number of the persons so conveyed was immaterial; that the principle could not be limited or restrained by any such considerations. The conveyance of a very small number of superior officers, to direct the operations of the enemy, might be of more importance, than the conveyance of a much larger number of persons in subordinate situations.

JUDGMENT.

Sir *William Scott*.—This is the case of an admitted *American* vessel; but the title to restitution is impugned, on the ground of its having been employed, at the time of the capture, in the service of the enemy, in transporting military persons first to *Macao*, and ultimately to *Batavia*. That a vessel hired by the enemy for the conveyance of military persons, is to be considered as a transport subject to condemnation, has been in a recent case held by this Court, and on other occasions. What is the number of military persons that shall constitute such a case, it may be difficult to define. In the former case there were
many,

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many, in the present there are much fewer in number; but I accede to what has been observed in argument, that number alone is an insignificant circumstance in the considerations, on which the principle of law on this subject is built; since fewer persons of high quality and character may be of more importance, than a much greater number of persons of lower condition. To send out one veteran general of *France* to take the command of the forces at *Batavia*, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater; and therefore it is what the Belligerent has a stronger right to prevent and punish. In this instance the military persons are three, and there are, besides, two other persons, who were going to be employed in civil capacities in the government of *Batavia*. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me, *on principle*, to be but reasonable that, whenever it is of sufficient importance to the enemy, that such persons should be sent out on the public service, at the public expence, it should afford equal ground of forfeiture against the vessel, that may be let out for a purpose so intimately connected with the hostile operations.

It has been argued, that the master was ignorant of the character of the service on which he was engaged, and that, in order to support the penalty, it would be necessary that there should be some proof of delinquency in him, or his owner. But I conceive, that is *not* necessary; it will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. In the case of the *Swedish* vessel (a), there was no *mens rea*

(a) *Caroline*,
supra, vol.

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in the owner, or in any other person acting under his authority. The master was an involuntary agent, acting under compulsion, put upon him by the officers of the *French* Government, and, so far as intention alone is considered, *perfectly innocent*. In the same manner in cases of *bona fide* ignorance, there may be no actual delinquency, but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation. If imposition has been practised, it operates as force; and if redress in the way of indemnification is to be sought against any person, it must be against those, who have, by means either of compulsion or deceit, exposed the property to danger. If, therefore, it was the most innocent case on the part of the master, if there was nothing whatever to affect him with privity, the whole amount of this argument would be, that he must seek *his* redress against the freighter; otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible, in the greater number of cases, to prove the knowledge, and privity, of the immediate offender.

It has been argued throughout, as if the ignorance of the *master alone* would be sufficient to exempt the property of the owner from confiscation. But may there not be other persons, besides the master, whose knowledge and privity would carry with it the same consequences? Suppose the owner himself had knowledge of the engagement, would not that produce the *mens rea*, if such a thing is necessary? or if those who had been employed to act for the owner, had thought fit to engage the ship in a service of this nature, keeping the master in profound ignorance, would it not be just as effectual, if the *mens rea* is necessary, that

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it should reside in those persons, as in the owner. The observations which I shall have occasion to make on the remaining parts of this case will, perhaps, appear to justify such a supposition, either that the owner himself, or those who acted for him in *Lisbon* or in *Holland*, were conversant of the nature of the whole transaction. But I will first state *distinctly*, that the principle on which I determine this case is, that the carrying military persons to the colony of an enemy, who are there to take on them the exercise of their military functions, will lead to condemnation, and that the Court is not to scan with minute arithmetic the number of persons that are so carried. If it has appeared to be of sufficient importance to the Government of the enemy to send them, it must be enough to put the adverse Government on the exercise of their right of prevention; and the ignorance of the master can afford no ground of exculpation in favour of the owner, who must seek his remedy in cases of deception, as well as of force, against those who have imposed upon him.

Having stated the principle on which my judgment must be understood to rest, I will advert a little to some incidental circumstances of the case; before alluded to, which appear deserving of particular observation. It has been argued that the vessel was going to *Macao*; I have no doubt that it would be so represented, for the purpose of giving a neutral *appearance* to the voyage; but it is equally evident that the real purpose was to go to *Batavia*. There was no cargo to be delivered at *Macao*; and the passengers, who were alone to be conveyed, all say "that they were going to *Batavia*." I have no doubt, therefore, that *Macao* was thrown in only for the purpose of giving a neutral destination to the voyage. The charter-

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party has been produced, and, taking it to be genuine, there are circumstances in it, that could not fail to excite suspicion on the part of the master. The contract is made in *Lisbon*, and according to the terms in which it is drawn, we must suppose, that it was made for the conveyance of a cargo of goods in the usual course. One provision is "that the master should receive the *freighter's supercargoes on board*." It does not very frequently occur to our experience to see more than one supercargo on board, except in adventures of particular magnitude, or under circumstances which account, in a natural manner, for the employment of more than one person in that capacity. But here is a *plurality* provided for, in the first instance, and in the case of a vessel which, as it turned out, was to carry no cargo whatever. It is stipulated, that the ship should be "*at his entire disposal, and that of the supercargoes, or passengers*," in which clause it is thrown in, for the first time, that the vessel was freighted for the conveyance of passengers. The rate of the affreightment is settled at one thousand dollars per month, on which I cannot but observe, that it appears not a little extraordinary that precisely the same sum should be paid for carrying out passengers alone, as for carrying out an entire cargo. Another extraordinary condition is, "*that if the supercargo should be disposed to put an end to the voyage in India, there should be paid five months' affreightment, whether that time should have expired or not*."

Connecting this charter party with what appears afterwards to have been the actual course of the transaction, that no cargo was put on board, but only these passengers, who are not usually made the subjects of stipulations for freight, we might have expected that it would have led the master to inquire what was the
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number of persons, and on what occasion persons of that distinction were going; because it appears that they were persons of such rank as to require particular accommodation. The master says, "that after the charter-party was made, he was informed at *Lisbon* that he was to carry no cargo, but only passengers, and that the ship was equipped for their reception, and was undergoing preparations for that purpose through the months of *March, April, and May.*" Surely this fact was at least startling, and might have suggested farther enquiries. If it did not, it is not easy to believe that deception was practised on any person, who was not disposed to wink very hard at what was going on.

I have no doubt whatever that this *was not the charter-party*, but that the real charter-party was made with the Government of *Holland*. Among the enumeration of voyages, it appears, that the vessel had gone recently from *America to Rotterdam*, where she had delivered her cargo, and that she proceeded from thence immediately in ballast to *Lisbon*. She had then been in the country of the enemy, in whose immediate service her employment was afterwards taken up. Can any thing be more probable than that the real contract was formed there, and that the vessel went to *Lisbon* only for the purpose of assuming a colourable destination, under this fictitious charter-party which has been brought forward? Another contract there must have been, and I have little doubt that the real engagement was formed in *Holland*. That supposition is confirmed by something which appears in the depositions of the principal person on board, who is a *French gentleman*, and a General of Brigade in the *Dutch army*. He says "that he left the *Hague in February*, by the directions of the Government of *Holland*, who ordered him to proceed

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to *Lisbon*, and informed him that he would there find a neutral ship chartered to carry him to *Macao*." This charter-party bears date the 13th of *March*. It is impossible, therefore, but that there must have been some other, for how could the Government of *Holland* have given him that information in the month of *February*, unless there had been some secret agreement during the stay of this vessel at *Amsterdam*? The same witness says "that the destination was to *Macao*, and that the master was not privy to an ulterior destination, but that if the master had refused, *he should have compelled him to go to Batavia*." But how could he have compelled him? By force he could not in a *Portuguese* settlement. It must have been by the production of some such instrument as would legally controul him, entered into with the agent of the ship in *Holland*. On every view which I take of the case, on the principle of law, or on the evidence of the facts, I have no hesitation in pronouncing that this vessel is liable to be considered as a *transport*, let out in the service of the Government of *Holland*, and that it is as such subject to condemnation,

[March 4th,
1808.

THE ATALANTA, KLEIN.

Unneutral conduct, the carrying of Dispatches from the governor of the Isle of France, to the Minister of marine at Paris, cause of condemnation, &c.

THIS was a case of a *Bremen* ship (a) and cargo, captured on a voyage from *Batavia* to *Bremen*, on the 14th of *July*, 1807, having come last from the *Isle of France*; where a packet, containing dispatches from the Government of the *Isle of France* to the Minister of Marine, at *Paris*, was taken on board by the master, and one of the supercargoes, and was afterwards found concealed, in the possession of the second supercargo, under circumstances detailed in the judgment.

The case was argued, much at length by *The King's Advocate, Laurence and Adams*, on the part of the *Captors*—and by *Robinson and Stoddart*, on the part of the *Claimants*.

It has not been thought necessary to insert the argument, in *this Report*, on account of the length of the case, and the very full manner, in which all the topics are discussed in the Judgment.

(a) The ship, in this case had been recently purchased as an *American* vessel in the *Isle of France*, in the place of the former vessel, which had been driven into the *Isle of France* in great distress, and there sold under the authority of the Court of Admiralty of that island, with so much of the cargo, as was required to defray the expences of transshipment, and the purchase of the present vessel.

JUDGMENT.

JUDGMENT.

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ATALANTA.March 4th,
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Sir William Scott.—This ship, or rather that of which the present vessel is the representative (*a*), sailed from *Bremen*, with a cargo of dry goods and provisions, part of which had been brought from *Amsterdam*, on the 23d of *July*, 1805. She touched at the *Cape of Good Hope*, and from thence proceeded to *Batavia*, where the cargo was sold, and another cargo taken in for *Tranquebar*. From that place a returned cargo was again brought to *Batavia*, where the present cargo of coffee and sugar was purchased, with which the ship sailed, on her return to the river *Jade*, in *December*, 1806. It appears that the voyage was interrupted by a violent tempest or hurricane, which visited those seas at that time, and the vessel was driven, by distress, into the *Isle of France*, where she was sold, as *not sea-worthy*; and the present vessel was purchased, which sailed with the cargo that had been transhipped, on the 12th of *May*, 1807.

(*a*) The proceedings in the Court of Admiralty at the *Isle of France*, which were detailed in a copy of the process on board, seem to have taken the following course:—On arrival the master entered his *protest*, detailing, at length, *the distress* and damage sustained, and praying a commission of survey and appraisal of the necessary repairs. The Court decreed the appraisal: and the report of the surveyors being returned, in act of court, the master recited the amount, and the inexpediency of repairing at that cost, recorded his abandonment or *délaissement*, and prayed a sale; which the Court, reciting his abandonment, decreed, as also the sale of part of the cargo. The whole transaction, which was under the eye of special *superargues* on board, appeared to be conducted with the strictest attention to the interests of the proprietors.

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The original master had died at *Tranquebar*, where the present master was appointed in his place by the two supercargoes, who were on board, and whose conduct will constitute the chief subject of observation in the present inquiry. The principal of these two supercargoes is Mr. *Gantt*, an *American* by birth, who is found in *Europe* at the commencement of the present transaction, and appears, in the opening of the correspondence, to have been going to *Amsterdam* and *Paris*, and to have returned again to *Amsterdam*, for the avowed purpose of superintending the purchase of parts of the outward cargo. The correspondence discloses one fact, which it would be improper to pass over altogether without notice, though I shall but briefly animadvert upon it, viz. that an offer had been made, through this gentleman, of an expedition jointly to be undertaken with the house of *Willis*, at *Amsterdam*, in which the name of that *Dutch* house was not to appear. The proposal was accepted, in the first instance, on these terms, by Mr. *Delius*, the managing owner of the present expedition at *Bremen*, but afterwards declined. I am not disposed to observe too rigidly on the morality of expressions thrown out in a correspondence of this nature; I content myself with saying, that the objection on which this offer was ultimately declined, seems to have arisen more from prudential considerations, and from apprehensions of what are called here, *British pretents*, than from any sense of the impropriety of engaging in such an adventure. This is all that I shall say upon it.

As far as I have looked into the proofs of property, which it has become unnecessary to examine minutely, I see no reason to suppose, that the property
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does not belong to the persons for whom it is claimed ; I will therefore dismiss that part of the case, remarking only, that the principal supercargo is a person who had been much, and immediately before the voyage began, in *Holland* and *France*, the mother countries of the colonies, with which this vessel comes in contact in the several stages of her voyage. If the fact be, that any thing was to be arranged with respect to the conveyance of dispatches, or other services to be performed, this supercargo had the opportunity of settling such arrangements by having been personally at *Paris*, as well as at *Amsterdam*, immediately before the commencement of this voyage. The vessel sailed from the *Isle of France* in *May*, having been detained some time as it is mentioned in a letter of the supercargo, " that they had been detained ten days by the Governor without any reason being assigned ;" however, at last they were permitted to depart on the 12th of *May*. The capture was made on the 14th of *July*, by the *Argo* private ship of war, being on her return from the *South Whale Fishery*. The ship's papers were demanded in the usual manner ; and again, afterwards, on the 5th *September*, there was a farther demand, on a supposition that the former had not been complied with. The mate, and four men, were put on board the *Argo*, who carried the vessel to *St. Helena*, where they met his Majesty's ship the *Sir Edward Hughes*, under the convoy of which ship they afterwards proceeded to *England*. In the course of the voyage some apprehensions began to be entertained of a meditated rescue, whether well-founded or not does not appear ; it was the cause, however, that led to a request, that Mr. *Meinen*, the other supercargo, might be removed on board the *Sir Edward Hughes*,

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Hughes, and that his baggage might be examined for concealed papers, though it is not explained, what had given rise to a suspicion of this kind. On this search was found, in the possession of Mr. *Meinen*, in his trunk, a small tea-chest, at the bottom of which were discovered those papers which were sent by Captain *Ratsey* of the *Sir Edward Hughes* to the Admiralty; and which are described, in the letter from the Secretary of State's Office, "to contain dispatches from the Governor of the *Ile of France* to the different departments of Government in *Paris*; stating the distress of the colony, and requesting assistance to preserve the settlement from ruin."

This being the fact then, that there were on board public dispatches of the enemy, not delivered up with the ship's papers, but found concealed, it is incumbent on the persons entrusted with the care of the ship and her cargo, to discharge themselves from the imputation of being concerned in the knowledge and management of this transaction: And more particularly, they might be expected to do this on their examination, which contains some interrogatories that point to the delivery of all papers. The account given by Mr. *Gantt* is, "that the ship was detained at the *Ile of France* six or seven days, but for what reason he was at that time ignorant," though I confess it appears a little extraordinary to me that he should be so; for he must have required an explanation, on behalf of his owners, of such an extraordinary detention. However, a packet was at last delivered to him by the Commandant, in the presence of the Master, addressed to the Minister of Marine at *Paris*, and which on the arrival of the vessel at *Bremen*, he was directed to deliver to Colonel *Richmond*,

mond, an officer of artillery on board, and second in command at the Isle of France, though he appears to have shipped himself as a planter, and as an inhabitant of the Isle of France, for the purpose, as it is said, of avoiding imprisonment in case of capture.

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This might, *perhaps*, be the real and the only inducement for consenting to take him under that disguise, but even *that* is an accommodation which neutral *ships masters*, and supercargoes, have no right to afford. If an individual is, from his military character, exposed to the operations of war, it is not for them to throw over him, from motives of compassion, or from any other inducement, a colourable protection by artifices of this kind. Mr. Gantt says, that he remonstrated with the Commandant, and represented to him the danger of taking such a packet, since he could neither conceal nor disclose it in case of capture, without inconvenience; so that it seems he was not altogether unaware of the consequences of having such things in his possession. To this the Commandant replied, "that he must, on such an event, give it to Colonel *Richmond*; that he then accepted it under compulsion, and with great reluctance." That may possibly be; and if the offence rested on that alone, it might, perhaps, be harsh, (though strictly legal) to involve him in penal consequences for an act done under a constraint and compulsion, to which a firm man might be allowed to yield, meaning to act properly, and according to his duty respecting it afterwards.

That leads us to the consideration of what was afterwards done with this packet. Mr. Gantt says, "that being directed to deliver it to Colonel *Richmond* on the appearance of a strange cruiser, he did

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so, on being chased by the *Piedmontese* frigate, about a fortnight after they sailed, and that he did not know what became of it." And it has been so argued for him, that he had discharged himself of it altogether, when it was delivered out of his custody, and thought no more about it. But that is the very delinquency attributed to this person, that having been privy to the taking of this packet on board, and having it, on that account, imposed on him *more particularly*, as a duty to belligerent cruisers to make the disclosure, he did not disclose it, but on the contrary, *affects* to have discharged it from his mind, for it is quite impossible that he should *really* discharge his mind of so memorable a circumstance, as, it is pretended, he *did*, when the cruiser came up. It was the event contemplated by him, and the parties who delivered it to him, which could not, therefore, but bring to his recollection, that there were enemy's dispatches on board, delivered to an officer of high rank, who was disguised as a planter. Not to have pointed them out to the attention of the captors, amounts to a fraudulent dissimulation of a fact, which, by the Law of Nations, he was bound to disclose to those who had a right to examine, and possess themselves of all papers on board. All that Mr. Gantt states further is, that he has *heard* it was found in the possession of *Meinen*, whom he believes to have been ignorant that there was such a packet on board; but that Gentleman has been examined, and therefore we shall see, from his own depositions, what account he gives of it himself.

I will first take *notice* of the evidence of the Master, who was also privy to the delivery; he speaks of it as a matter of notoriety, "that they had been detained several days, by the order of the *French* Government of

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of that place, in order to take on board a packet, which was delivered to the *supercargoes*, with orders, that in case any strange vessel should appear in sight during the passage, the said packet should be delivered into the possession of Colonel *Richmond*. He speaks of both the *supercargoes* being present, though that is now said to be a mistake. It is perfectly clear, however, that it was known to him that there was a packet on board. Can it be said *then* that it was a secret to him what became of this important packet afterwards, when the ship was detained? Every one must be aware of the danger of having papers of that description on board, as Mr. *Gantt* admits that he was. Must it not have been a matter of inquiry then among them, what had become of this dangerous packet? And can we believe that Mr. *Meinen* was entirely left out of such a communication? or that he was in effect ignorant of the transaction, whether he was present at the delivery or not? Mr. *Meinen*, it is to be remembered, was in the situation of *second* *supercargo* on board, equal in authority with Mr. *Gantt*, as the papers describing their authority, and the letter mentioning their detention, import. That Mr. *Gantt* should not communicate to him that *he* had received such a packet, and that it was for that cause they had been detained, is so much out of all probability, that no one can give a moment's credit to it. He must have been equally startled with Mr. *Gantt* at the detention, and equally solicitous, and equally entitled to know the cause.

Let us now see what account Mr. *Meinen* gives of his part in this transaction, on his examination. He is there represented to have deposed, "that the packet

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was given to Gantt by the Governor," which, it is argued, manifestly shews, that he was not present at the delivery, because it was received, not from the Governor, but from the *Commandant of Fort Bowen*, who is, it seems, an officer, in the situation of a *Town Major*, and not to be confounded with the Governor of the Island. I see no material contradiction in this account, because a delivery by a subordinate officer of the Government might not inaccurately be considered as a delivery by the Governor himself, without the necessity of a personal interview. Mr. *Meinen* then states, "that the packet was delivered to Colonel *Richmond*, and that on Colonel *Richmond*'s removal from the *Atlanta* to the *Argo*, he desired Mr. *Meinen* to take possession of a small chest of tea, which he did, and took it with him on board the *Sir Edward Hughes*, where, upon its being opened, the said packet was found concealed under the tea, of which he was totally ignorant until the said chest was found, never having been informed thereof by the said Colonel *Richmond*."

The effect of this representation then is to shew, that a gross fraud had been practised upon him by Colonel *Richmond*, deeply affecting the interests of his employers. I do not perceive that he was led to question, in any manner, the anxiety which was expressed about the box of tea; yet I cannot but think that it was, in itself, a circumstance of strong suspicion, that it should be an object of any attention, with an officer of Colonel *Richmond*'s rank, to protect, in a special manner, a parcel of tea of about 15 lbs. weight, which could not, for a moment, be supposed to be otherwise than perfectly safe in his own keeping.

through under the custody of any Captain, either of his Majesty's Navy, or of a privateer. The very solicitude expressed by such a person, about a trifle of this kind, must, I think, have given cause *subodorari aliquid*, so as to have put Mr. *Meinen* on his guard, more especially if it was in the *knowledge* of the individual, as it must have been, that a packet of importance had been delivered to this very gentleman, in the manner above described. This argument is a little weakened, indeed, by what has been since stated in the affidavit of Mr. *Meinen*, in which he denies any knowledge of the delivery of the packet, if I understand him right, either to *Gantt*, or afterwards by *Gantt* to Colonel *Richmond*. But this, I think, is utterly incredible. That after having been detained *several days*, for some unknown cause, which turned out, upon the final explanation, to be the delivery of a packet, it should be received by his colleague, and yet be kept a secret from him, at the time, and again during the voyage, when it became an object of attention on falling in with the *Piedmontese* frigate, is, what I must pronounce to be out of the compass of all rational belief.

There is, besides, a letter on board, which shews that the fact could not be so. It is a letter addressed to him by Mr. *Gantt* after the disclosure, expressing his surprize to hear, "that the dispatches which *were forced upon us by the Government of the Isle of France*, had been found in his possession." This is not the language to be used to a man ignorant of the fact; it evidently implies a mutual privity and knowledge in the parties, otherwise the writer would have apologized for his own separate act, and for dissembling with him upon a point of so much importance; it is an
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expression altogether incompatible with the asserted ignorance of Mr. *Meinen*; and I must again repeat, that assertion of Mr. *Meinen* to be unworthy of any credit, it being clear, that the detention at the *Isle of France* was under this very *offensible reason*. If Colonel *Richmond* is to be credited, it was for the sole purpose of *furnishing* a pretext for detaining the ship, and to satisfy the supercargo on that head, that he made up the packet, which he is pleased to represent as containing nothing but insignificant papers relating to his own personal concerns; and his statement of the real cause of the detention is, that it was to accommodate him with a passage to *Europe*, for which he was not quite ready. According to this account, the packet is That which would be ostentatiously and industriously held out to the master, and supercargoes, detained upon such a pretence.

There is another letter, written by Mr. *Meinen*, from on board the *Sir Edward Hughes*, describing a list of things left behind on board the *Argo*, which he wished to have sent to him, and amongst them, I perceive, is mentioned, with peculiar solicitude, this box, "which was *entrusted to my care*, and which I wish to have in my possession." On this letter I must observe, that it is in direct contradiction to another letter, in which this gentleman endeavours to exonerate himself to Captain *Ratsey*, from the legal custody of the box, by intimating, that it could not be considered as being in his possession, since he was himself in the power and the possession of the captors. There is also, on this point, an affidavit of Mr. *Fleming*, who was an officer on board the *Sir Edward Hughes*, a person without any interest in the question at issue, and whose credit is therefore quite unimpeached on that

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that ground, or on any other (a). If the credibility of his testimony is put in competition with that of the other person, who denies the substance of the affidavit, but who is at least in the situation of a person apologizing, retracting, and exculpating himself, it is impossible, I think, to doubt on which side the preference is due, and not to conclude, that the anxiety expressed was on account of this box, (agreeable to the representation given by Mr. *Fleming*), and with reference to the contents which were actually found there.

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There is also another paper, which has not attracted much observation, but which is, I think, material, as enabling the Court to judge a little of the conduct of Mr. *Meinen* on this occasion; and it is always of great importance to see what is the conduct of persons charged with the possession of that which would fix guilt upon them. In the first place, what may we suppose would be the natural behaviour of a person having a noxious packet of this kind palmed upon him?—an instant ebullition of resentment and indignation; an eager promptitude to exculpate himself, and to disclose all the circumstances which might prove his own innocence, and cast the reproach on those to whom it justly belonged. On the other side, what would be the behaviour of a person conscious of delinquency?—silence, delay, hesitation, and reflec-

(a) Mr. *Fleming*'s affidavit stated, that on the day when the order was given for searching the baggage, which was to be done after dinner, Mr. *Meinen* was much agitated at dinner time, and could not eat; that he remarked upon it to Mr. *Meinen*, and that he replied that he was agitated; that he had something in his green chest, which he would not shew to any person but the Lords of the Admiralty. This was contradicted by Mr. *Meinen*.

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tion, till something could be patched up to meet the imputation charged upon him by the discovery. If these are natural tests of conduct, it will be obvious from them, what were Mr. *Meinen's* real impressions on this occasion. The paper to which I allude, is a letter, or draft of a letter, sent to Captain *Rafsey* four days after the discovery, in which Mr. *Meinen* says, "since the moment my baggage was searched, I have looked for an opportunity of speaking to you *alone*, which I have not found. When Mr. *Richmond* was leaving the *Atalanta* he gave me the tea-box, requesting me to take care of it, and *return it to him on our arrival*," which is not very consistent with the account which he gives elsewhere, when he says he was to forward it to a particular house at *Hamburg*, "not suspecting it could contain the papers which you found, particularly as Captain *Klein* had refused to take any papers at the *Isle of France*, I took it under my care, but not in my possession, *for I myself was in the possession of Captain Baden of the Argo*. When I came on board your ship, I did not bring it with me, and if I had known that it contained political papers, I should have left it in the hands of the person who gave it me." Then mark the description which this person gives of a man who had treated him with this most scandalous dishonesty, and when he had just detected him; I say, with the most scandalous dishonesty, for it is impossible to conceive a greater injury to be done to any man, than to palm upon him the custody of papers, which endangered the ship, or cargo, or both, to the possible extent of the entire forfeiture of property, of so large an amount, committed to his care. Of such a person Mr. *Meinen* writes notwithstanding, in concluding this letter, "*who, by the bye, is too much of*

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a gentleman to deny any of these facts." There is another passage, which is crossed out, "as to Mr. Klein and Mr. Gantt they knew nothing of it." That is rubbed out in this paper, which appears to be but the draft of the letter which was actually sent, as it might naturally occur to him that it would be inconvenient, if they who were absent on board the other ship should have told a contrary tale. He then goes on; "I did not mention this before, because I did not wish it to be known by the crew, or by any body but yourself." *Why* so? Could an innocent man have any wish that the crew and all the world should not be acquainted with his innocence? On the contrary, it is the very disclosure which he would most eagerly have desired. If a fair man, he must have the common desire to exonerate himself from the offence, which had become public, and to make his vindication as notorious as the charge. This letter convinces me, looking to what we must suppose would be the natural conduct of an innocent man under such circumstances, that he was, in fact, fully apprized, but that the excuse offered was not ready at the moment, till it was framed upon deliberation and reflection. It is impossible to read this letter without being convinced, that there is not one *particle* in it to which any man can give credit, as containing the real sentiments of the writer.

On these grounds, attending to the facts of a delivery to Gantt, of a delivery from him to Richmond, and finally from Richmond to Meinen, I feel myself bound to pronounce, *that there were papers received on board, as public dispatches, and knowingly by those who are the agents of the proprietors; that these affidavits are utterly unworthy of credit, and that*

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that the fact of a fraudulent concealment and suppression is most satisfactorily demonstrated.

The question then is, what are the legal consequences attaching on such a criminal act? for that is criminal and most noxious is scarcely denied. What might be the consequences of a *simple* transmission of dispatches, I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a *fraudulent* case. That the simple carrying of dispatches, between the colonies and the mother country of the enemy, is a service highly injurious to the other Belligerent, is most obvious. In the present state of the world, in the hostilities of *European* powers, it is an object of great importance to preserve the connection between the mother country and her colonies; and to interrupt that connection, on the part of the other Belligerent, is one of the most energetic operations of war. The importance of keeping up that connection, for the concentration of troops, and for various military purposes, is manifest; and I may add, for the supply of civil assistance also, and support, because the infliction of civil distress, for the purpose of compelling a surrender, forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of these dispatches might relate only to the civil wants of the colony, and that it is necessary to shew a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered, in the contemplation of law, as an object of hostility, although not produced by operations strictly military. How is this intercourse with the mother country kept up, in time of peace? by ships of war,

or by packets in the service of the state. If a war intervenes, and the other Belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does, in fact, place himself in the service of the enemy-state, and is justly to be considered in that character. Nor let it be supposed, that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of dispatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other Belligerent in that quarter of the world. It is true, as it has been said, that *one ball* might take off a *Charles* the XIIth, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that in the contemplation of human events, it is a sort of evanescent quantity of which no account is taken; and the practice has been accordingly, that it is in considerable quantities only that the offence of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size, as not to be capable of producing the most important consequences in the operations of the enemy: It is a service therefore which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature.

It has accordingly been so held in decided cases, that fully recognize the principle; for on *this principle* the *Constitution*, (a) *Tate*, was condemned; and how is that

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(a) Lords,
14th July 1808.

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that case to be distinguished? It is said, that ~~that~~ was not a case of dispatches simply, but that it was dependent on the modified relaxation of the principle of exclusion, from the colonial trade of the enemy in the *West Indies*; that it was also a case of *carrying backwards and forwards*, in two separate instances, from the *Havannah* to *Trunillo*, and back again. But can these circumstances make any difference? The exclusion being taken off, that trade stood upon the common footing; and if the carrying of the original dispatches is no offence, will the circumstance of being made the vehicle of carrying the answer to those dispatches make it so?

(c) Lords,
13th Dec. 1795.

The case of the *Sally* (a), *Griffiths*, has been mentioned as one in which this principle was not applied, at the commencement of the late war; but ~~there~~ the dispatches were not referable to the operations of war, or even to the existence of war. The vessel had sailed before the knowledge of hostilities; and the dispatches were altogether of a commercial nature, from the *French Minister in America*, relating to a contract for flour, which had been made (wholly unconnected with the war, and prior to the expectation of such an event), for the purpose of supplying *France* and the *French colonies* in the *West Indies*, in a year of great scarcity.

(d) Lords,
22d April 1803.

The *Hope* (b), *Ferrier*, is another case, which has been mentioned, as an instance in which the Superior Court passed over an *imputation* of this kind, without suffering it to obstruct the sentence of restitution, which was finally decreed. But in that case it was admitted, that no such paper was on board. There was merely a receipt, appearing to have been given by the Captain, for a packet taken by him from the Governor of *Batavia*, to be transmitted to the

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Dutch Minister in *America*, and to be forwarded ultimately to *Amsterdam*. In fact, the question was not raised: It was argued, that the packet might not have been on board, and that it might, notwithstanding the receipt, have been sent by some other *American* ship, of which there were several lying at *Batavia* at the same time. The case came before the Court of Appeal from the Vice Admiralty Court at the *Cape of Good Hope*, and the Superior Court acted on the presumption, that the Court below had made the necessary inquiry, and had been satisfied on that point. The appeal proceeded on other grounds, and therefore the question did not fairly present itself, and the Court of Appeal, adopting the conclusion of the Court below upon the point, did not think it necessary to direct farther inquiry to be instituted upon this fact, when the cause came on to be heard, and when the opportunity of investigating it was gone by. The effect of that decision, therefore, has no application to the present question.

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In the *Trende Sofre* (a), in which the same fact came incidentally before this Court, the question of law was avoided, as was also that of contraband, by the circumstance, that, before the seizure, the *Cape of Good Hope*, to which port the vessel was going, had ceased to be a colony of the enemy, and had become an *English* settlement.

(b) 5th Aug.
1807.

In the *Lifette, Petersen* (a), which had carried a *Dutch* packet in the *Danish* mail-bag, the vessel was captured on the returned voyage, and then also a paper of this description was produced by a woman, who had so disordered herself, by the manner in which she appeared to have acted, being the person who had taken the papers on board, by fraud against the

(a) 5th May,
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master (who had conducted himself *optima fide*, and had exerted his utmost influence and authority to prevent any papers from being put on board), that the Court repudiated her evidence altogether, and refused to act upon it in a case of that description.

- In all these cases the principle was uniformly asserted, although the circumstances, under which the fact appeared, did not lead the Court to consider it with that particularity, which the nature of the present case requires. Unless, therefore, it can be said, that there must be a plurality of offences to constitute the delinquency, it has already been laid down by the Superior Court, in the *Constitution*, that the fraudulent carrying the dispatches of the enemy is a criminal act, which will lead to condemnation. Under the authority of that decision then I am warranted to hold, that it is an act which will affect the vehicle, without any fear of incurring the imputation, which is sometimes strangely cast upon this Court, that It is guilty of *interpolations* in the laws of nations. If the Court took upon itself to assume *principles* in themselves novel, it might justly incur such an imputation; but to apply established principles to new cases, cannot surely be so considered. All law is resolvable into general principles: The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not *new*, nor is it justly chargeable with being an *innovation* on the ancient law; when, in fact, the Court does nothing more than apply old principles to new circumstances. If, therefore, the
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decision, which the Court has to pronounce in this case, stood on principle alone, I should feel no scruple in resting it on the just and fair application of the ancient law. But the fact is, that I have the direct authority of the Superior Court for pronouncing, that the carrying the dispatches of the enemy, brings on the confiscation of the vehicle so employed.

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It is said, that this is more than is done even in cases of contraband; and it is true, with respect to the very lenient practice of this country, which, in this matter recedes very much from the correct principle of the law of nations, which authorizes the penalty of confiscation. This is rightly stated, by *Bynckerhoek*, to depend on this fact, whether the contraband is taken on board with the actual or presumed knowledge of the *owner*—I say presumed knowledge, because the knowledge of the master is, in law, the knowledge of the *owner*; “*si sciverit, ipse est in dolo, et navis publicabitur* (a). This

(a) *Bynker. I P.*
c. 12. p. 95.

Country, which, however much its practice may be misrepresented by foreign writers, and sometimes by our own, has always administered the law of nations with lenity, adopts a more indulgent rule, inflicting on the ship only a forfeiture of freight in ordinary cases of contraband. But the offence of carrying dispatches is, it has been observed, greater. To talk of the confiscation of the noxious article, *the dispatches*, which constitutes the penalty in contraband, would be ridiculous. There would be *no* freight-dependent on it, and therefore the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle.

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Then comes the other question, whether the penalty is not also to be extended further, to the cargo, being the property of the same proprietors—not merely *ob continentiam delicti*, but likewise because the representatives of the owners of the cargo, are directly involved in the knowledge and conduct of this guilty transaction? On the circumstances of the present case I have to observe, that the offence is as much the act of those who are the constituted agents of the cargo, as of the master, who is the agent of the ship. The general rule of law is, that where a party has been guilty of an interposition in the war, and is taken *in delicto*, he is not entitled to the aid of the Court, to obtain the restitution of any part of his property involved in the same transaction. It is said, that the term “interposition in the war” is a very general term, and not to be loosely applied. I am of opinion, that this is an aggravated case of active interposition in the service of the enemy, concerted and continued in fraud, and marked with every species of malignant conduct. In such a case I feel myself bound, not only by the general rule, *ob continentiam delicti*, but by the direct participation of guilt in the agents of the cargo. Their own immediate conduct not only excludes all favourable distinction, but makes them pre-eminently the object of just punishment. The conclusion therefore is, that I must pronounce the ship and cargo subject to condemnation.

The Court observed afterwards:—I will mention, though it is a circumstance of no great consequence, that I have seen the dispatches in this case, and that they are of a noxious nature, stating the strength of the different regiments, &c. and other particulars entirely military.

THE CAROLINE, DOAH, Master.

April 12,
1808.

THIS was a case of the same general class (a) as the preceding, on the question of dispatches, found on board of an American ship, which had been captured

Dispatches on board a neutral ship, but going from the Ambassador of the Enemy's State, resident in the Neutral State. Distinction from the preceding case, &c.

(a) Other cases that have occurred on the question of dispatches, are The *Constantia*, *Holbec* (b), a Danish ship, taken on a voyage from the *Ile of France* to *Copenhagen*, having on board a packet, which was to be delivered to the French ambassador at *Copenhagen*, to be by him forwarded to the departments of Government in *France*. Hostilities with *Denmark* having intervened, the claims of the Danish proprietor could not be given. The case was argued only, with respect to the interest in the prize, between the Crown and the captors and therefore no special explanations were offered on the part of the master. The Court observed, upon the evidence, that the master appeared to have taken charge of this packet knowingly; and though there did not appear to have been any fraudulent concealment, he had been in the custody of a British frigate fifteen days without making any disclosure of the fact; that he was part owner of the vessel and of the cargo, and had been entrusted with the management of the expedition, as agent, by his copartner; that the case, therefore, must follow the course of the *Atalanta*, independent of the breaking out of Danish hostilities, on which only the claim of the Crown was founded. That the Captors were entitled to the condemnation of the ship and cargo.

(b) 15th March, 1808.

The *Susan* (c), an American vessel, captured on a voyage from *Bordeaux* to *New York*, having on board a packet, addressed to the Prefect of the *Ile of France* (of which it did not appear that it contained more than a letter, providing for the payment of that officer's salary). The master had made

(c) 1st April, 1808.

The
CAROLINE.

April 10,
1808.

tured with a cargo of cotton and other articles, on
freight on a voyage from *New York* to *Bourdeaux*.
In

an affidavit, averring his ignorance of the contents, and stating that the packet was delivered to him by a private merchant, as containing old newspapers and some shawls, to be delivered to a merchant at *New York*. The insignificance of such a communication, and its want of connection with the political objects of the war, were insisted upon. But The Court overruled that distinction, under observations similar to those above stated; and on the plea of ignorance observed, that without saying what might be the effect of an extreme case of imposition practised on a neutral master, notwithstanding the utmost exertions of caution and good faith on his part, it must be taken to be *the general rule*, that a master is not at liberty to aver his ignorance, but that, if he is made the victim of imposition, practised on him by his private agent, or by the government of the enemy, he must seek for his redress against them. That in this instance the master did not appear, even from his own account, to have used any caution to inform himself of the nature of the papers; that with respect to the disclosure, although the papers were not so kept, as to implicate him in the charge of a fraudulent concealment, they were not produced to the captors as they ought to have been. That since it appeared, that cases of this description were multiplying so fast, as to have produced four instances, of neutral vessels making themselves in this manner subservient to the purposes of the enemy, within the present sitting, it was necessary to be known, that it would be considered as a proof of fraud, if papers of this description being on board were not produced voluntarily in the first instance.—In this case the ship was condemned, but the cargo was restored, and even that part belonging to the owner of the ship, as it did not appear that the master had been appointed, agent for the cargo. But (a), on prayer that the master might be allowed his private adventure, The Court observe, that this was a description of cases in which the usual indulgence of the Court, in that respect, would be misapplied. That it was an offence originating chiefly in the misconduct or culpable negligence of the master, and that whilst he was acting

(a) 2d June,
1808.

In this case the dispatches were *those* of the *French* Minister, and the *French* Consul, in *America*, going to the Departments of Government in *France*.

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ing thus culpably and wantonly with respect to the property of his owner, it could not be expected that he himself should escape with impunity, as far as his own adventure in that transaction was concerned.

Also the case of the *Hope*, Jones (a), an *American* vessel, (a) 9th April, 1808. captured on a voyage from *Bordeaux* to *New York*, having on board various dispatches to the officers of government in the *French West India* islands and the *Ile of France*. There was also on board a military officer of rank, aid du camp to General Villaret, who had lately come from *Martinique*, and was returning to that island, and who had been shipped in the character of a merchant's clerk, going to settle some outstanding accounts in *New York*. The master made an affidavit, protesting his ignorance, and stating, "that, in answer to a request made to him, he had refused, publicly in the coffee-house at *Bordeaux*, to take any public papers; that the papers in question were brought on board in the officer's baggage, and had been stowed away in the hold for want of room in the cabin assigned to him." The veracity of this account was contradicted by a shipping paper on board, from the custom house at *Bordeaux*, which described *this* trunk "as sent on board originally with a direction, that it should be stowed in the hold." The Court observed again, that the general rule must be held strong against the averment of ignorance; that the circumstances of the present case did not even approach to a case of that kind; That it was scarcely credible, that the master could have been deceived with respect to the character of a military officer of high rank, so as to be imposed upon by the disguise of a merchant's clerk, which he had pretended to assume; that he was further discredited, by the representation which he had attempted to impose upon the Court, respecting the manner in which the trunk was concealed.—The Court condemned the ship, but restored the cargo, though the property of the owner, as the master did not appear to have been appointed supercargo, or agent with regard to the cargo.

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The case was argued by the *King's Advocate* and *Laurence* on the part of the captors, on the ground of *dispatches*, prior to the case of the *Atalanta*; and by *Arnold* and *Jenner* on the part of the claimant. It was afterwards argued a second time, on the effect of a distinction arising from the circumstances of the *dispatches* being in a couple of conveyance *not* from the colonies of the enemy, but from a State in amity, and from the public Embassador of the Enemy, resident in that State, to his own Government.

JUDGMENT.

Sir *W. Scott*.—This is the case of a ship which was captured, having on board dispatches from the Minister and Consul of *France*, in the *United States*, to the Government of *France*. The Court has before had repeated occasion to express its opinion, that the carrying the dispatches of the enemy from the colonies to the mother country, is a criminal interposition in the war that will lead to condemnation. In this case a distinction was taken, very briefly in the original argument, which, I confess, struck me very forcibly at the moment, that carrying the dispatches of an Embassador, situated in a neutral country, did not fall within the reasoning on which the general principle is founded; and I cannot but say, that the further argument which I have heard on that point, and my own consideration of the subject, have but confirmed the impression, which I then received, of the solidity of this distinction;—That the carrying the dispatches between the mother country and her colonies is criminal, can hardly be doubted; and I have never heard of a claim of privilege of this kind being asserted on the
part

part of any nation, or by any individual. On the contrary, the artifices of clandestinity and concealment, with which such acts have always been accompanied, strongly betray the opinion which the individuals themselves entertain of the *right*.

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It has been asked, what are dispatches? to which, I think, this answer may safely be returned; that they are all official communications of official persons, on the public affairs of the government. The comparative importance of the particular papers is immaterial, since the Court will not construct a scale of relative importance, which, in fact, it has not the means of doing, with any degree of accuracy, or with satisfaction to itself: it is sufficient, that they relate to the public business of the enemy, be it great or small. It is the right of the Belligerent to intercept and cut off *all* communication between the enemy and his settlements, and, to the utmost of his power, to harass and disturb this connection, which it is one of the declared objects of the ambition of the Enemy to preserve. It is not to be said, therefore, that this or that letter is of small moment; the true criterion will be, is it on the public business of the state, and passing between public persons for the public service? *That* is the question. If individuals take papers, coming from official persons, and addressed to persons in authority, and they turn out to be mere private letters, as may sometimes happen in the various relations of life, it will be well for them, and they will have the benefit of so fortunate an event. But if the papers so taken relate to public concerns, be they great or small, civil or military, the Court will not split hairs, and consider their relative importance.

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For on what grounds can It proceed to make such an estimate with any accuracy? What appears small, *in words*, or what may, perhaps, be artfully disguised, may relate to objects of infinite importance, known only to the enemy, and of which the Court has no means of judging. The Court, therefore will not take upon itself the burthen of forming such a scale, but will look only to the fact, whether the case falls within the general description or not.

The circumstances of the present case, however, do not bring it within the range of these considerations, because it is not a case of dispatches coming from any part of the enemy's territory, whose *commerce* and communications of every kind the other Belligerent has a right to interrupt. They are dispatches from persons who are, in a peculiar manner, the favourite objects of the protection of the law of nations, *Embassadors*, resident in a neutral country, for the purpose of preserving the relations of amity between that state and his own government.

On these grounds a very material distinction arises, with respect to the right of furnishing the conveyance. The former cases were cases of neutral ships, carrying the enemy's dispatches, from his colonies to the mother country. In all such cases you have a right to conclude, that the effect of those dispatches is hostile to yourself, because they must relate to the security of the enemy's possessions, and to the maintenance of a communication between them; you have a right to destroy these possessions and that communication; and it is a legal act of hostility so to do. But the neutral country has a right to preserve

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its relations with the enemy, and you are not at liberty to conclude, that any communication between them can partake, in any degree, of the nature of *hostility* against you. The enemy may have his hostile projects to be attempted with the neutral state; but your reliance is on the integrity of That Neutral State, that It will not favour nor participate in such designs, but as far as Its own counsels and actions are concerned, will oppose them. And if there should be private reason to suppose, that this confidence in the good faith of the neutral state has a doubtful foundation, That is matter for the caution of the Government, to be counteracted by just measures of preventive policy, but is no ground, on which this Court can pronounce, that the neutral carrier has violated his duty by bearing dispatches, which, as far as he can know, may be presumed to be of an innocent nature, and in the maintenance of a pacific connection. One material ground, therefore, is wanting, on which the judgment of the Court proceeded in the former cases. Another distinction arises, from the character of the person, who is employed in the correspondence, He is not an executive officer of the Government, acting simply in the conduct of Its own affairs within its own territories, but an Embassador resident in a neutral State, for the purpose of supporting an amicable relation with it.

I have before said, that persons discharging the functions of Embassadors, are, in a peculiar manner, objects of the protection and favour of the law of nations. The limits that are assigned to the operations of war against *them*, by *Vattel*, and other writers upon those subjects, are, that you may exercise your right
of

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of war against them, wherever the character of hostility exists; *You may stop the Ambassador of your enemy on his passage*; but when he has arrived, and has taken upon himself the functions of his office, and has been admitted in his representative character, he becomes a sort of *middle-man*, entitled to peculiar *privileges*, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are, in some degree, interested. It has been argued, that he retains his national character unmixed, and that even his residence is considered as a residence in his own country; But That is a fiction of law invented for his further protection only, and as *such a fiction*, it is not to be extended beyond the reasoning on which it depends. It was intended as a *privilege*; and I am not aware of any instance, in which it has been urged to his disadvantage. Could it be said that he would, on that principle, be subject to any of the *rights of war* in a neutral territory? certainly not: He is there for the purpose of carrying on the communications of peace and amity, for the interest of his own country primarily, but, at the same time, for the furtherance and protection of the interests, which the neutral country *also* has in the continuance of those relations.

It is to be considered, also, with regard to this question, what may be due to the convenience of the Neutral State; for Its interests may require that the intercourse of correspondence with the Enemy's Country should not be altogether interdicted. It might be thought to amount almost to a declaration, that an Ambassador from the enemy shall not reside in the neutral state, if he is declared to be debarred from the only means of communicating with his own. For to what useful purpose can he reside there,

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there, without the opportunities of such a communication? It is too much to say, that all the business of the two states shall be transacted by the minister of the neutral state, resident in the enemy's Country. The practice of nations has allowed to neutral states the privilege of receiving ministers from the Belligerent states, and the use and convenience of an immediate negotiation with them.

It is said, and truly said, that this exception may be liable to great abuses, and so perhaps, will any rule that can be laid down on this subject:—

———— *Mille adde catenas;*
Effugiet tamen hæc————

Opportunities of conveying intelligence may always exist in some form or other. It may happen, that much mischief may arise by the communication of news, in the private letters of intriguing *private men*, or, as the *French* government has been much in the habit of employing such characters, of *intriguing women*; but if they are not stamped with the character of public communications, this Court cannot pursue the consequence to the penalty of those persons, who may be made the vehicles of conveying such a correspondence. It has been argued truly, that whatever the necessities of the negotiation may be, a private merchant is under no obligation to be the carrier of the enemy's dispatches to his own government. Certainly he is not: and one inconvenience, to which he may be held fairly subject, is that, of having his vessel brought in for examination, and of the necessary detention and expence. He gives the captors an undeniable right to intercept and examine the nature, and contents of the papers, which he is carrying;
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for they *may* be papers of an injurious tendency, although not such, on any *a priori* presumption, as to subject the party who carries them to the penalty of confiscation, and by giving the captors the right of that enquiry, he must submit to all the inconvenience that may attend it.—Ship and cargo restored on payment of captors expence.

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No. I.

MONSIEUR LE MINISTRE PLENIPOTENTIAIRE,

Paris, le 24 decembre 1806.

JE m'empresse de répondre à la note que vous m'avez fait l'honneur de m'adresser le 20 de ce mois.

Je pense que le décret impérial du 21 novembre dernier, n'apporte jusqu'ici aucune modification aux réglemens actuellement observés en France, à l'égard des navigateurs neutres, ni conséquemment à la convention du 30 septembre 1800 (8 vendémiaire an 9), avec les Etats-Unis d'Amérique.

Mais, quoique par cette réponse, les quatre questions sur lesquelles votre Excellence a désiré connaître mon opinion, se trouvent implicitement résolues, je crois pouvoir ajouter,

1. Que la déclaration exprimé par l'article 1. du décret du 21 novembre, ne changeant point la législation française actuelle sur la prises maritimes, il n'y a nul motif de rechercher quelle interprétation, ou restriction, ou étendue peut être donnée à cet article.

2. Que de saisies contraires aux réglemens actuels sur le cours, ne seraient point allouées aux capteurs.

3. Qu'un navire américain ne pourrait être pris en mer, par la seule raison qu'il va dans un des ports de l'Angleterre, ou qu'il en revient, puisque, conformément à l'article 7 dudit décret, on doit se borner en France, à ne pas admettre les bâtimens venant de l'Angleterre ou des colonies anglaises.

4. Que les dispositions des articles 2 et 5 dudit décret, s'appliquent naturellement aux citoyens étrangers, domiciliés en France, ou dans les pays occupés par les troupes de S.M. l'Empereur et Roi, attendu quelles ont le caractère d'une loi générale ; mais qu'il conviendrait que votre Excellence traitât avec le ministre des relations

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lations extérieures ce qui concerne le correspondance des citoyens des Etats-Unis de l'Amérique avec l'Angleterre.

Je prie votre Excellence, Monsieur le ministre plénipotentiaire, de recevoir l'assurance de ma haute considération.

Le ministre de la marine et des colonies,

Signé DECREÛS.

P. S. Il n'échappera pas à Monsieur le général Armstrong, que mes réponses ne peuvent avoir le développement qu'elles recevraient du ministre des relations extérieures, et que c'est naturellement à lui qu'il doit s'adresser pour ses explications, que je suis fort aise de lui donner puisqu'il les désire, mais sur lesquelles j'ai des données moins positives que le prince de Bénévent.

Conforme à l'original,

Signé D.-B. WARDEN, *secrétaire du ministre plénipotentiaire de Etats-Unis.*

APPENDIX.

NOTE I.

On the Practice of the British Prize Courts, with regard to the Colonial Trade of the Enemy, during the American War, &c.

IN some publications which have appeared during the last two or three years, relative to the principles that are applied by this country to the colonial trade of the enemy, the practice of the *American war* is amongst other topics brought into discussion. From the manner in which that part of the subject is treated, it may be inferred that the *Prize History* of that period is but very imperfectly understood. It is merely for the purpose of putting on record a faithful statement of facts, that the following Note is constructed, as a supplement to those passages in the several volumes of these Reports, in which the subject is incidentally mentioned.

In one Treatise, generally ascribed to a *Gentleman* high in official situation under his own Government, it seems to be assumed, that the principle of disputing *the legality of trading with the colonies of the enemy*, which had been acted upon, with much precision, in the war of 1756, was *totally intermitted*, as a pretension not advanced in the political or judicial discussions of the subsequent war. "The next inquiry," it is said, "relates to the war of the *American revolution*; or the *French war* of 1778. Here it is conceded on the *British* side, that the *new principle* was *throughout that period entirely suspended*. On the other side it may be affirmed that it was absolutely abandoned."

What the principle was, in form and effect, it will be unnecessary to state with particularity in this place. With respect to its origin, it may be not so superfluous to remark that it is sometimes very incorrectly termed the *principle of the war of 1756*; and that advantage is taken of this manner of describing it, when it is styled "*a new principle*"; and when it is said, "to be a material fact, that the principle

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principle was never asserted or enforced before the war of 1756." To assign the proper origin to this principle will not appear immaterial, if it is recollected, that a prominent part of the question in dispute is placed on this consideration, Whether it was a principle of *partial* and *occasional* application merely, and whether the discontinuance of the practice, which took place at the close of the *American* war, amounted to a general and *unqualified* *renunciation*?—or whether the reverse of this representation is not more consonant to the truth.—That the principle was universal in its establishment, as naturally incident to the state of facts out of which it grew; and that the continuance was *occasional* only, and dependent on schemes of colonial policy, which have since been superseded and withdrawn?

As a measure of practical hostility, it would necessarily follow, in order of time, and be dependent on, the *subject* against which it operated, the increasing importance of this branch of the enemy's resources, and the policy observed by the enemy with respect to it. In what proportion this *branch* of the *commerce of France* had been growing up, in common with the colonial interests of other *European* nations, may be seen in a striking point of view in Mr. *Arnould's* History of the *Commercial Relations, and the Balance of Trade of France* (a) in which work the produce of the colonies is considered, throughout, as the great staple commodity, by which that country was enabled to support and carry on her commerce with the Northern States. What the *policy of France* has been relative to this *peculiar trade*, and how little reason there is to impeach the *Principle* itself, from any *delay*, or *indetermination*, that can be attributed to the manner, in which it was originally applied, may be collected also from the statements of *French* Writers. From the passages subjoined (b) it will appear, that the war of 1756 was,

not

(a) P. 157.
198: 210. &
seq. 263. 362.

(b) "Ce n'est par la première fois qu'on a voulu recourir en France aux nations neutres, pour approvisionner et visiter nos Colonies, et que ce secours a été reconnu insuffisant et ruineux." M. de Pontchartrain, étant Ministre de la Marine, crut qu'il seroit bon d'admettre dans nos colonies les nations amies; mais les premiers vaisseaux qui furent expédiés ayant été pris, le Ministre revint tout de suite au seul expédient vraiment efficace; il traça un plan de protection pour la navigation Française si excellent, que quoique nous fussions en guerre avec l'Angleterre, et la Hollande

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not the first instance, in which the protection of the colonial trade of *France*, by the intervention of neutral privileges, had been made a *device* and *stratagem* of war, and that it was so far at least *counteracted*, in effect, by this Country, in the preceding wars of that century, as to be immediately abandoned. The fluctuations of policy thus abruptly pursued by the enemy, will best explain how it may have happened, that the principle did not assume its more *distinct character* prior to the war of 1756. With respect to the *suspension* of the principle, as described in the work above mentioned, it will be the object of the following note to shew what the course of that suspension actually was; how far it may be considered as an *entire suspension throughout that war*, or as an *absolute abandonment*; and at what particular time it was introduced.

In another passage of the same treatise, referring to the explanation which has been given of that suspension, a doubt is suggested, whether the views ascribed to the *French Government*, and the construction asserted to have been put upon them by the Prize Courts of this Country, can be shewn by any evidence to have led to the relaxation in question. "At what particular time, it is asked, and in what particular terms, this important *declaration* by *France* was made, is not mentioned; nor has any such *declaration* been discovered by a search, which has been carried through all the *French codes*, and such of the annals of the times as were most likely to contain it; and without some further account of this *declaration*, or this "*profession*" on the part of *France*, as it is elsewhere called, it is impos-

lande, à la fois, les primes ne passèrent par 20 pour cent d'entrée or de sortie de St. Dominique, et de la Martinique et 15 à 22 pour cent pour aller à Québec."—This must have been in the war that ended with the peace of *Utrecht*.

"In 1744, l'Administration voulut tenter la même chose: On fit expédier de *Hollande* six navires pour *St. Dominique*, la *Martinique*, et *Cayenne*. Cinq furent pris; celui pour *Cayenne*, beaucoup plus petit, et moins important, arriva; de là on prit le parti sage d'établir des convois, et d'interdire aux amateurs toute expédition particulière" *Considérations sur l'admission des navires neutres, aux colonies Françaises de l'Amérique au tems de guerre* page 13.

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sible to decide on the precise character and import of it." In answer to this call for further information, it will be also the object of the following note to supply such facts, as may have fallen within the scope of the Editor's observation. It will at least be shewn by contemporary documents that the *understanding*, which is traditionally reported to have prevailed, *was discussed and agitated*, as a distinction operative in point of legal effect, if the fact of such a change of system, on the part of *France*, could be satisfactorily established.

If this is shewn, much stress will not, it is hoped, be laid on the terms "*declared by France, declaration, or profession on the part of France*;" as if those expressions necessarily implied a direct communication between the hostile governments. Such a *profession*, so made, would indeed have been a singular occurrence, and deserving of the very small degree of credit, which the writer justly remarks would be due to it. If collateral facts should correspond to shew that the *understanding* alleged *did prevail*, there will not be wanting other channels of communication, through which such a persuasion would be more naturally, and more effectually, inculcated, as there may be hereafter occasion to remark.

With respect to the assertion, "That the rule was suspended throughout that period," or as it is expressed by another Gentleman "*that it was left sight of in the war that ended in the year 1783.*" The most effectual correction that can be opposed to such statements, will be by reference to a professional *Opinion* given, so late in those hostilities, as the 24th of *February*, 1781, by an Advocate of very distinguished Accuracy and Experience.—*That Opinion* states the result of the cases which had occurred during the preceding war, and "that it was to be concluded from those precedents, that the event *would be the same, if the appeal interposed in the present case should be prosecuted*;" but that no case of the same nature had been determined, either by the Lords of Appeal, or the High Court of Admiralty of *England*, during any part of the war."

We learn then, from the best authority, that the question had not presented itself in the High Court of Admiralty till that late period of the war. From the history of the case itself it is evident that the Vice Admiralty Courts had proceeded, without hesitation, to apply the principle which had been uniformly acted upon in the former war.

(b) 30th Jan.
1781.

In the *Decisions of the Court of Session in Scotland* (b), also, there is reported the case of the *Catharina*, a Dutch ship, captured

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gured on the 22d of May, 1780, and brought to *Glasgow*, and condemned expressly on the ground that the cargo was laden at *St. Domingo*, and was admitted to be the produce of that island. That case went by appeal to the House of Lords, where the sentence of the Court of Session, and of the High Court of Admiralty of *Scotland*, was reversed. It was intimated by the learned Lord who moved for the reversal, "That the High Court of Admiralty in *Scotland* had no jurisdiction in Prize Causes." But the point principally relied on seems to have been, "Because the principle on which the Courts had proceeded, although adhered to in the war which ended in 1763, had been departed from in that which terminated in 1782 (a)."

Before the House of Lords the case appears to have undergone a full *discussion*, from the statement given of it in Mr. *Browne's* Parliamentary Reports (c), and from the reasons still extant, in the papers printed for the *hearing* of the cause. From thence we gather several particulars which have not accompanied the history of the case, in which the same question was decided by the Lords of Appeal in Prize Causes. The two cases were nearly contemporary (d), on similar facts, and argued by the same Eminent Persons. It is not known that any note is now extant of what passed in the particular case of the *Tiger*. In defect of proof, therefore, from the proceedings in the original case, we may be at liberty to advert to what is preserved in this parallel case, and to consider the two cases as identically the same. From the argument before the House of Lords, we learn the precise edict of the *French* Government, to which the attention of the Courts of this Country was directed, as distinguishing colonial cases of that period from the precedents of the former war. It was an edict issued at *Paris* on the 31st July 1779, by which, as it is recited, "*The subjects of all states not at enmity with France were allowed to trade with the French colonies.*"

It would be desirable to ascertain the exact terms of this edict; but it is not printed *entire*: nor has the search made for it been hitherto successful. The above recital is copied from the printed case of the appellant. In another passage it is stated somewhat differently, as an edict "*laying open the French West India trade to all foreigners or neutral nations.*" On the part of the claimant "the effect of this decree was pressed, as materially distinguishing the case from the cases of the preceding war, which, the appellants

(a) Decisions of the Court of Session, ut supra.

(c) Vol 5. p. 328, edit. 1803.

(d) *Tiger*, Lords of Appeal, 22d Jan. 1782.—*Catharine*, House of Lords. 2d May, 1783.

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(c) 23d June,
1782.

tended, did not apply, not being similar to the question at issue. They denied that they had any licence from, or commerce or connexion with *France*, that could in any shape make the ship or cargo *French* by adoption; they only availed themselves of the liberty that was given to them as subjects of *Holland*, in common with every other nation in the world not at war with *France*, in consequence of an edict of *Paris*, the 31st July, 1779, laying open the *French West India* trade to all foreigners and neutral nations. And reliance was placed, as to the legality of a trade so permitted, on a precedent then recently decided by the Lords of Appeal in Prize Causes (a), in the case of the *Tiger*, a *Danish* ship from *St. Domingo* to *St. Thomas*, and some other subsequent cases."

From the manner in which the edict is recited, there is reason to believe, that the tenor of the ordinance is pretty fully preserved, although the precise expressions may not all be retained. It was a general and universal opening of the colonial market, and in consequence of an edict of *Paris* of the 31st July 1779.

This circumstance is not altogether immaterial, as implying perhaps something *special* in the mode or design of making the proclamation. A partial liberty of trade had been previously granted by the governors of the respective islands, at *St. Domingo*, at least, and at *Martinique*, prior to the declaration (b) of war, or the knowledge of actual hostilities in that part of the world. The admission of foreigners into the port of *St. Domingo* was authorized by an ordinance of the Governor, recited in the papers of the *Tiger*, bearing date the 20th of July 1778, and entitled, an "Ordonnance concernant l'Introduction des bâtimens étrangers, et le payement des droits," &c. And in a collection of the acts of *Martinique*, entitled "*Annales de la Martinique*." There is an ordinance of the governor, of the 7th July, 1778, "declaring the ports of that island open to foreign traders, for the supply of the island."

Whatever the secret object of the proclamation of 1779 may have been, the purport of the edict was at least *general*. It will be observed, perhaps, that nothing is mentioned of another material character, ascribed to this change in the policy of *France*,

(b) The order for reprisals, on the part of *France*, bears date the 10th of July 1778; reciting the capture of two *French* frigates by the *English*, on the 17th of June preceding. In a subsequent order of the 5th of April 1779, the commencement of hostilities is directed to be reckoned, *retroactively*, from the date of the 17th of June 1778.

* that

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"that it was understood also to be promulged as permanent," But from the same case we collect that a character of that kind had been ascribed to it. It is in the latter part of the printed *Reasons* of the captor that this topic is introduced, in conclusion of the general argument, of which a short extract may not improperly be inserted here.

In support of the sentence of the Court below, it was contended, "That the case came precisely within the principles that had been applied to the colonial trade during the late war; that the continuance of the same principle had been enacted by the legislature in the statute (a) which permitted a regulated trade to *Grenada* and the *Grenadines*, in neutral ships bound to any neutral port;" but with a provision that it should not extend to any other island than *Grenada* or the *Grenadines*; "*the whole of which loadings or cargoes shall be liable to confiscation and condemnation as lawful prize, any thing in this act to the contrary notwithstanding.*"

(a) 20 Geo. 3.
c.29. A.D. 1780.

"That agreeable to the same principle, there was a clause in the instructions to the owners of private ships of war, which enjoins the commanders of such private ships and vessels as shall have letters of marque and reprisals, that they do not upon any account seize upon or detain any ship belonging either to the States General of the United Provinces, or to their subjects, bound from one *European port* to another, or from any *Dutch settlement* to any port of the United Provinces, and *vice versa*—By which it was plainly implied that British privateers might seize Dutch ships coming from a French West India settlement, with goods taken in there."

"That, with respect to the edict of the French King, of the 31st July, 1779, "*by which the trade of the colonies was laid open to all neutral states,*" it was to be recollected that during the last war Dutch ships engaged in this trade obtained special licences from the French Government, but these were constantly disregarded, when urged as obviating the allegation of their being engaged in a trade only open to French subjects, and were even taken as conclusive evidence of their being adopted French ships. During the present war, it is said, a general licence had been given, which cannot vary the case when the views and consequences are precisely the same. 'The opening a trade to the colonies of France, *flagrantus ballo*, was a transaction to the prejudice of Great Britain, and a mere device and cover for fraud. A Dutchman trading under a privilege of this kind, is not in the ordinary situation of a neutral subject, continuing his own commerce with the warring nations,

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*As in time of peace ; he is to all intents and purposes carrying on the trade of France, being admitted to a participation ad bene-
ficium in the exclusive rights of a French subject."* Then follows the passage more particularly connected with the present subject.
" No person can possibly believe that the licence to other State will be continued by France after the peace ; it has been shown in a variety of instances, that the Dutch do not understand that it will ; and until such licence has been granted, or continued, in time of profound peace, no regard can be paid to it when issued in time of war."

Here, then, we seem to approach near to the object of this enquiry. For when the grounds of a *Judicial* Decision are not stated by the Court, there is no better mode of collecting the reasons *conjecturally*, than by tracing them through the arguments of the several parties. It is in this argument admitted, that the effect of such a change would supersede the principle, that had been established upon a different state of facts ; and by the attempt to prove that a permanent change was not *very credible*, it is implied also, that *such a change* was contended for. Considering the argument in this case as *identified* in substance with the argument before the Lords of Appeal in *Prize Causes*, we seem to have approached as near to the secret deliberations of that Court of *Judicature*, by which the deviation from former precedents was first sanctioned, as the nature of the investigation will admit.

In addition to what has been stated as direct evidence of such an impression, it may not be immaterial to consider, also, how far it might be supported, or opposed, by the *general* opinions of the times. On this point it cannot be forgotten that the very *fashion* of *political theories* at that period, was precisely of a character to give countenance and support to such a pretension. In this country the policy of throwing open the colonial trade, had been strenuously recommended by persons of great name and authority, and particularly by the celebrated author of "*The Wealth of Nations*," a work which had then recently appeared. Similar sentiments had been industriously cultivated by the *économistes* in France, by Mr. *Mirabeau* especially, and, amongst other grounds, with a reference to the *precarious* relation subsisting between the colonies and the parent state, on the breaking out of a war.

From the little tract before mentioned, published in 1779, entitled, "*Considérations sur l'admission des Navires neutres aux colonies Francoises de l'Amerique, en tems de guerre*," may be collected many important traces of the views of colonial

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policy entertained in *France* at that period. It appears that there had been strong fluctuations of opinion on this subject, on the part of the Government of *France*, antecedent to the actual commencement of hostilities. That publication was intended to have appeared about the end of *April* 1778, but some obstacles had prevented it. "Now, however, it is said, since Government has abandoned the project of *provisioning* the colonies by means of *neutrals*, and has adopted the method of protecting our own commerce by strong convoy, we may, without inconvenience, venture to consecrate, by this publication, principles so according with those of the Government, and introduce to the public a work, which has no other object but the national honour and prosperity."

Of a Government wavering between such views, it is neither an illiberal, nor a strained interpretation of their Acts, to believe that they would willingly concur in any representation that might promote the great object of national prosperity. A more simple, and perhaps the just interpretation, would be to suppose, that they might be so undetermined in respect to their future plans, as to be not chargeable with fraud in encouraging any representations, that might be circulated, of the continuance and intended permanence of their present policy. This, at least, may be assumed, that if there were any other parties disposed to contend for a construction of their acts, that would secure a temporary advantage to their trade, it was not from any more explicit declaration, on the part of the *French* cabinet, that the fallacy of such a representation would be exposed.

This leads to a consideration of the question, whether it was probable that other parties would *interest themselves* in that cause? and there are not wanting traces of such an interposition. It has been at all times an object of solicitude with neutral States, to promote and extend the trade of their subjects, by the assurances which they may be enabled to give of the views and dispositions of Belligerent powers, respectively, towards themselves. It is not *unfrequent* with them to contend for *particular immunities*, on condition that they may be able to obtain the same privileges from the opposite Belligerent.

The disposition of the neutral States to act in concert, and with every possible advantage for the extension of their commerce, at that particular time is well known. In whatever form the interference may be supposed to have been made, traces of some such
inter

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interposition, are to be perceived in a work entitled, "A Treatise on Neutrality," published by Mr. Henning, at Altona, in 1784, soon after the termination of that war.

From the subject of Blockade the writer passes on to treat of the situation of the enemy's Colonies:—"A very important consideration connected with the present subject," says he, "is the trade with the colonies in the *West Indies*." In respect to them is there any foundation whatever for considering the islands in the *West Indies* as in a state of blockade? And if there is not, what necessity could there be for a special proclamation on the part of *Great Britain*, authorizing neutral ships to trade in the produce of *Grenada* and the *Grenadines*; since those islands have fallen into the possession of *France*, and *France* has laid open the Trade from *Martinique* and her other islands? Further, on what grounds can *Great Britain* prescribe, that the returned cargoes from *Grenada* or the *Grenadines* shall go to neutral ports, under the name of some commercial house of those islands, in order to exclude the produce of the other *French* islands from being carried as any part of those cargoes?"—Some remarks are then made on the limitations of the *Grenada* act, which 'fix its commencement *prospectively* from the 1st June 1780, and provide, that nothing in that act should be taken to affect any judgment already given. These are not improperly considered as maintaining a general principle of exclusion, which the writer terms an infringement on neutral rights, asserting, that *France* alone has the right of *permitting*, or *not*, the trade with her own colonies.

"It is true, indeed, (it is observed,) that an *English* act of parliament can be no law for foreign states, nor operate to the diminution of their rights. But it is a direct authority to *British* subjects for the seizure and condemnation of all ships and cargoes coming from the *French* or *Dutch* colonies, the effect of which must be to impose great embarrassments on neutral trade. And it is obvious, that these embarrassments must be severely felt, if the difficulties which grow out of such particular ordinances, are not adjusted in an amicable and friendly manner by treaty, more especially if the neutral state grants the protection of an armed convoy for a trade, which the belligerent state treats as *interdicted*. Now, although, in respect to the trade with the colonies in *America*, since *France* has opened it to all nations, no express concession has been made on the part of *Great Britain*, still all vessels seized for having brought goods from the *French* and *Dutch* colonies, have been released by the *British* Courts of Admiralty, and the colonial trade

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trade has been generally permitted to all neutral ships: We may therefore consider that point as settled (a)."

(a) Pag. 52.

This is all that is said on the colonial principle throughout the treatise. In these observations it is not easy to discern any very precise understanding of the ground, on which the principle had been originally placed, nor any very firm persuasion that it had been *absolutely* renounced. On the other hand, they contain an acknowledgment that the principle of exclusion had been asserted in that war, and that the relaxation was considered, always, in conjunction with the *unlimited opening of the French colonies*, and as consequent upon that alteration of system. The practice of the Courts of Admiralty of this country is set in opposition to the want of any *direct and absolute concession*, on the part of the Government; from which it may be inferred, that the change of practice was introduced on considerations *far short of a general and unqualified renunciation of the principle*; and that the parties to whom alone a formal *concession* might, at any time, have been expected to be made could be no other than the neutral states endeavouring by negotiation, and by all means in their power, to establish the right of their subjects to this extended commerce.

But, it is asked, "why, at least, was not the rule enforced as to the colonies of *Spain* and *Holland*, with regard to which no change of policy is even imputed." The answer with respect to *Spain* may be found in the fact, that the colonial trade of that kingdom was carried on chiefly under special licences, granted to what were termed *registered ships*, and that cases of that description (a) were condemned on the same course of reasoning, that had been applied to them in the war of 1740.

(a) *Herrigman*,
9th Dec. 1780.

With respect to the *Dutch colonies*, the period (a) at which *Holland* came into the war was so late, that, on that account alone, no particular inference can be drawn from the conduct of this Country towards the *Dutch colonies*.

(a) War declared,
20th Dec. 1780.

It may not, however, be altogether *irrelevant* to the due consideration of the subject, to advert to the situation of the principal *Dutch* settlements during that war. *St. Eustatius* was captured immediately on the breaking out of hostilities, on the 3d Feb. 1781. Of the state of *Curacao*, it became notorious, in the case of the *Nieuwe Vriendſchaap*, captured in January 1783, that from the beginning of the *Dutch* war, above twenty sail of *Dutch* ships had been lying there nearly two years in expectation of convoy, with cargoes on board; and being unable to obtain convoy, they were passed over to *Imperial houses* at *Ghent* and other

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other places, for the purpose of protecting the property. They sailed in the autumn 1782, and were several of them captured in the beginning of 1783, a short time prior to the termination of the war. Though occurring late, and after the decision in the *Tiger*, they were in their nature undoubtedly cases of trade with the colonies of *Holland*, with regard to which no change of system is known to have been intimated; and the answer to the question must perhaps be placed on this consideration—That in the course of successive *hostilities* against confederated powers, it is natural, and frequent, in practice, not to vary general rules, though they may have been adopted, originally, with reference to the situation of the principal enemy in the war.

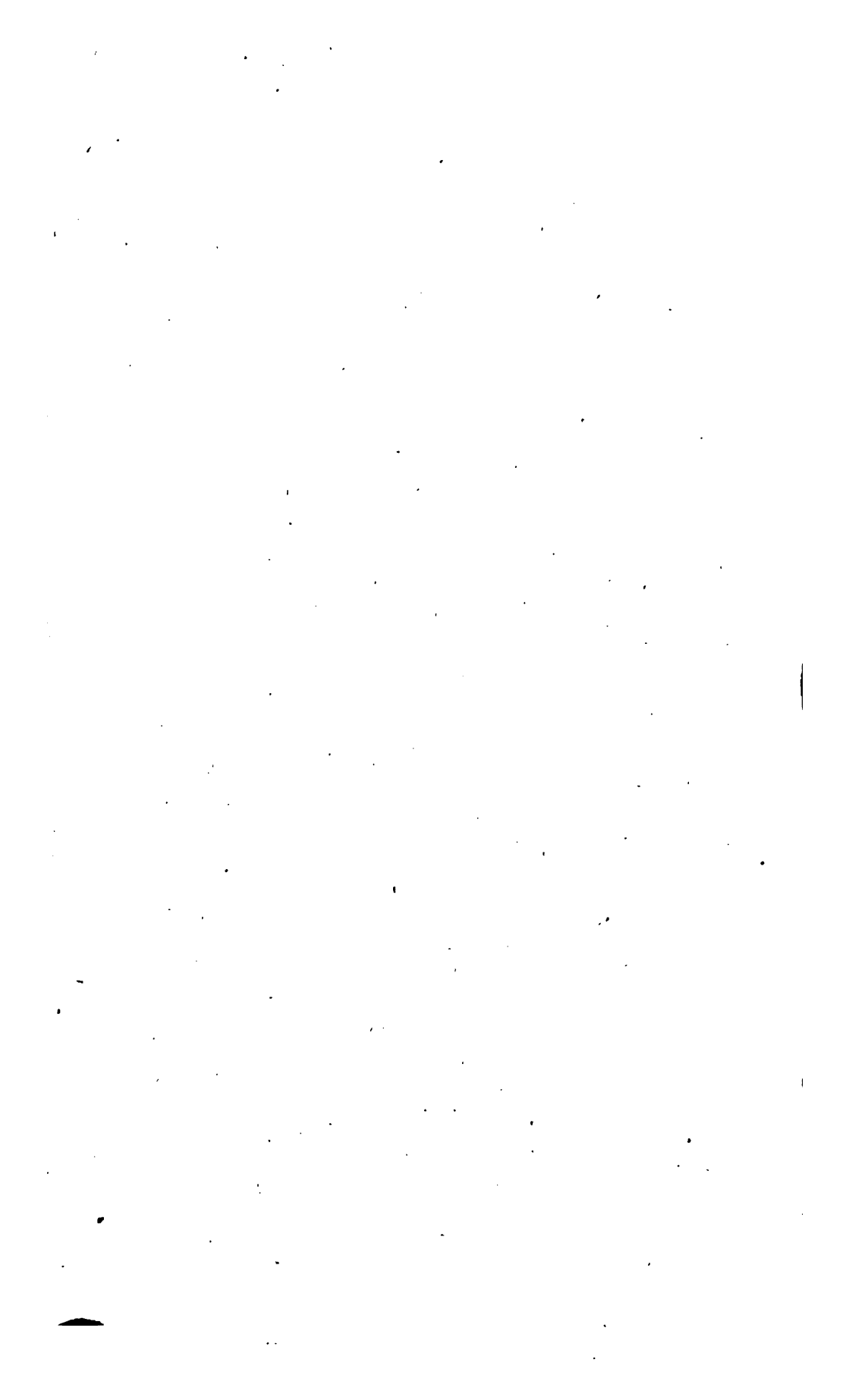
These are the observations, which the Editor has been induced to collect, under a desire of assisting to ascertain, with some degree of historical precision, the course of a transaction, to which a reference is frequently made in very general and indefinite terms. If the result of this enquiry should appear to rest, in some parts, more than might be desired, on conjectural reasoning, it will be received, it is hoped, with attention to the difficulty of obtaining positive evidence of opinions, and sentiments, which had no appropriate channel of communication, through which they can be directly traced. It will at least establish some points not before brought to public notice. It will shew that the explanation, traditionally recorded of the judicial grounds of this relaxation, is strictly conformable to the course of *argument actually pursued*—and that it is corroborated by the accounts given of the change by foreign contemporary writers. Lastly, it will justify a conclusion, that the representations before cited, and also the following, “that not only the trade of neutrals to the belligerent coasts and colonies was sanctioned by the *British* courts *throughout* the war of 1778, but that the sanction was derived by the law of *nations*, and consequently that the new principle, condemning such a trade, was not merely suspended under the influence of a particular consideration that ceased with that war, but was, in pursuance of the true principle of the law of *nations*, *judicially abandoned and renounced*.”—It will justify a conclusion, *That positions of this tenor are not warranted by a specific reference to the acts of those times.*

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THERE is one other remark, which the Editor takes the opportunity of introducing here, as connected with that branch of the colonial principle which relates to *continuous* voyages. It is merely to point out to those, who may have occasion to observe upon the manner, in which that extension has grown out of the original principle, a circumstance which appears to have hitherto escaped notice, *viz.* that it was in the first instance adopted as a rule of equitable construction in favour of neutral trade, in protection of that part of a cargo, which had gone from *Hamburg* to *Bordeaux*, and was afterwards captured on the ulterior part of the voyage to *St. Domingo*. Those goods were contended to be liable to condemnation, under the instructions. They were excepted, however, by the interpretation which the Court adopted, that the touching at *Bordeaux*, accompanied with an entry, and the forms of exportation, did not create such an incorporation into the commerce of *France*, as could render the destination of the continuous voyage liable to be considered, as between French ports only. The words used by the Court on that occasion were nearly the same as those applied (a), *et converso*, to similar circumstances appearing afterwards in cases which have been made the subject of much discussion. The Court observed, "Another consideration was likewise pressed against these goods, that having been entered at *Bordeaux*, and exported from thence it must be deemed an actual exportation from that port, and consequently that they are liable to be treated legally in the same manner (whatever that manner may be) as the goods first put on board at *Bordeaux*. I incline to think that this would be much too rigorous an application of principles, rather belonging to the revenue law of this kingdom, a system of law having little in common with the general prize law of nations, and that these goods are entitled to be considered as coming from *Hamburg*, their original place of shipment. Former decisions having fully established that a DIRECT commerce from a neutral country to a French settlement was open, I decree restitution of these goods."—Adm. Rep. vol. 2. pa. 197.

(a) *Maria Jackson*, 5 A. R. Rep. and other cases.



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Cases most readily admitted are those of *British* subjects, or subjects of allies in *war*, praying relief from difficulties imposed by the restrictions of the enemy, which may have rendered it impracticable for them to take clearances in their proper form. An exception in favour of such cases is to be found so far back as the decisions of the Court of Session in *Scotland* in 1673, in the case of the *Liveday*, 1673. *Stair's Decisions*, 2 vol. p. 229; also *Clerk v. Smeeton*, vol. 2. p. 241.

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